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THE NEW

Natura Brevium

OF THE

Most Reverend JUDGE

Mr. *ANTHONY FITZ-HERBERT*.

TO WHICH IS ADDED

A C O M M E N T A R Y,

Supposed to be written by the late

LORD CHIEF JUSTICE *HALE*.

R
THE NINTH EDITION,

Collated with former Editions, and corrected; some NOTES and
REFERENCES added; and the INDEX considerably enlarged.

IN TWO VOLUMES.

VOL. I.

L O N D O N:

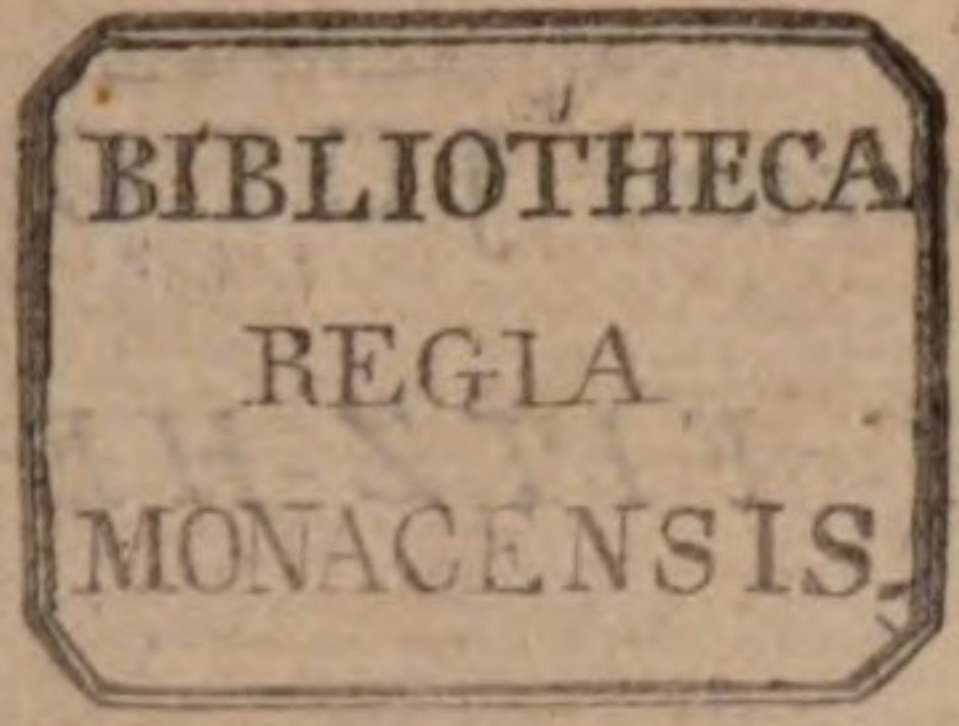
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BARRISTERS AT LAW PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH, FLEET-STREET.

1794.

THE NEW

Revised Edition

OF THE



MONACHII

IN THE LIBRARY OF THE

TO WHICH IS ADDED

A COMMENTARY

ON THE HISTORY OF THE

LIBRARY OF THE

THE NEW EDITION

OF THE HISTORY OF THE LIBRARY OF THE

IN TWO VOLUMES

VOLUME I

LONDON:

PRINTED BY A. WILKINSON AND W. WILKINSON.

AND SOLD BY THE AUTHOR, AT THE SIGN OF THE

FOR J. BENTLEY, ORANGE STREET.

1794.

ADVERTISEMENT

TO THE

SEVENTH EDITION.

IT may be proper to inform the reader, that the annotations, and notes added to this edition, are chiefly of two kinds, and collected by two several hands, *viz.* The one consisting only of references to the year-books, and the other printed reports, are set in the margin, and were collected by Sir *Wadham Windham*, who was constituted one of the judges of the King's Bench *anno* 1660. The other being very curious notes and observations on the most remarkable and useful writs and divisions of the book, were collected and digested into method, by that great and good judge Sir *Matthew Hale*, (who the 7th of *Nov.* 1660, was made Lord Chief Baron of the Exchequer, and the 18th of *May* 1671, was constituted Lord Chief Justice of the King's Bench) and as these illustrate and explain many doubtful and abstruse cases and points in the original, so the whole may well be denominated, Sir *Matthew Hale's Commentary on Fitz-Herbert's Natura Brevium.*

As to the subject matter of these annotations or commentaries, the reader may observe Sir *Matthew*'s chief regard therein was to illustrate and explain such writs as relate to the following particulars :

- I. To the church and church-men.
- II. To the regal state and government.
- III. To the real rights, or estates in lands or offices.
- IV. To personal rights in goods and chattels.
- V. To the method of process and proceeding.

And therefore we find his annotations larger and fuller on such writs, as do respectively relate to any of these heads.

What remains to be observed as to the present edition, is, that it has been carefully examined with the original, that the references, and cases cited have been corrected by the books referred to ; and that the observations and annotations have been duly placed and distributed under their respective paragraphs, with proper marks referring to the subject matter, word or sentence to which they do respectively relate.

This book may well be said to contain a complete body of the common law, and that not only in its theory and judicial part ; but also in its praxis and method of proceedings, from the forming of the writ or action, to the judgment and execution had thereupon.

A D V E R T I S E M E N T

T O T H E

N I N T H E D I T I O N.

WHEN these sheets were first sent to the press, nothing more was intended, than merely to give a literal copy of the last edition in the present more convenient form. But upon examining some of the proofs, so many errors and corruptions were discovered, that it was thought improper to proceed without consulting the earliest editions. This was accordingly done, and by means of this collation, several important mistakes have been rectified, and several spurious passages rejected.

The errors in the few sheets which had been worked off, before this plan was adopted, will be found corrected in the Errata.

Some few additional notes and references are introduced ; and the Index is enlarged
and

and corrected : but the principal merit which the Editor pretends to, is that of having attempted to restore the integrity of the work.

No other pages are inserted in the margin, but those of the first edition ; for no other appeared to be necessary ; the references to this work being generally made to those pages, and the marginal letters.

Easter Term 1794.



THE

P R E F A C E

Composed by the Reverend JUDGE

Mr. ANTHONY FITZ-HERBERT.

*I*N every ART and SIENCE there are certain Rules and Foundations to which a man ought to give Credit, and which he may not deny.

*In like Manner there are divers rules and Fundamentals in the Knowledge of the Common Laws of the Land, to which credit ought to be given, they being very necessary for those who would understand the Laws especially at the beginning of their studies; for upon those fundamentals the whole law dependeth. For which purpose, in time past there was composed a very profitable book, called The Register, which containeth sundry principles, in which he who would understand the law, must be early instructed. And also for that purpose was there composed by a learned man, a book called Natura Brevium, which book describeth and setteth forth with accuracy and care the diversities and natures of many
origi-*

*original Writs, with their proceſs; and helpeth much to the underſtanding not only of The Re-
giſter, but alſo of the law of the Land. But
becauſe of late time that book hath been tranſlated
into our own language, and many things are in-
ſerted in it, ſome of which are not according to
the Law of the Land, and many omitted which
are very profitable and neceſſary for the under-
ſtanding of the Law; for that cauſe is this trea-
tiſe compoſed and publiſhed, wherein, if there be
any thing againſt the opinion of the Sages who
have the Adminiſtration of the Laws, the Re-
queſt of him who hath taken the pains to make it,
is, that they would correct and amend it, as they
may ſee good, according to the Law.*

THE

A T A B L E

OF THE

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E R R A T A.

- Page 8. C line 4 for "shew" read "sue"
- 9. G l. 14. insert "de" between "recto" and "rationabili"
- 10. D l. 9. after "the lord" add "if he distrain the tenant after he has sued out the writ directed to the lord,"
- 10 F l. 12. insert "where" after "and"
- 11 C l. 4. for "nor shall a man not have" read "nor shall a man have"
- 11 L l. 9. dele "from hence thereupon"
- 21 N l. 10. dele "not"
- 26 K l. 2, 3, dele "non after issue joined" "40 Aff. 17."
- 36 K l. 10. for "doth come" read "doth not come"
- 37 l. ult. dele "not"
- 37 F l. 17. for "presents in right" read "presents and not in right"
- 37 H l. 18 dele (,) and insert (.) and before then the party "37 H l. 19. add "and if in truth there be no plea depending in the Common Pleas"
- 40 N l. 13. for "presenter" read "presentee"
- 48 Q l. 2. for "betwixt him another" read "betwixt him and another"
- 49 L l. ult. for "such possessory writs which are grounded on the mere right" read "such writs as are possessory and not grounded on the mere right"
- 59 M l. 2. for "head wood" read "dead wood."
- 69 G l. ult. dele "and therefore no return of them, see 22 H. 7. 3. contra in case of trespass"
- 69 H l. ult. dele "but against a servant or bailiff he may 1 H. 6. 7."
- 1 l. ult. for "but not in both" read or in both "and dele" see 19 H. 6. 34. and 11.
- 69 L l. ult. dele "see Lutw. 1150."
- 117 B l. 2. dele "or hath by purchase"
- 125 G l. 8. dele "in writ of admeasurement brought against one of common in D. the defendant said that he had lands in B. and S. to which he held common in the same place and yet the writ good; for it is only then that the ouster of the outlawry shall not be in the same place only, yet it seemeth all the common shall be admeasured. Temp. Ed. 1. Admeas. 15."
- 145 L l. 5. dele "no"
- 251 D l. 7. for "&c." read "and"
- 251 D l. 8. for "and" read "shall"

FITZ-HERBERT,

H I S

Natura Brevium.

Writ of Right Patent.

A **T**HE natures of the original writs are to be shewed and declared, according to the manner and form as they are in order written and set down in the register, which shall be expressed and specified in manner following:

And first, because the (a) writ of right patent is in its nature the highest writ in law, the nature of that writ shall be first declared, and where it lieth.

This

(a) *The Proceedings on a Writ of Right.*

1. *The Count or Declaration.*] See Coke's Entries 182. The count in a writ of right of his own seisin; and 23 E. 3. 8. a count that it was his right and his heritage, which is thus entred: J. S. demands against J. N. the manor of D. as his right and inheritance, by the lord the king's writ, &c. whereof he saith he himself was seised as of fee and right in time of peace, in the time, &c. and offers to maintain that such is his right, &c.

2. *The Defence and Mise, or Issue joined.*] The defence is thus: And the aforesaid A. comes and defends the

right of the aforesaid J. S. the demandant, and his seisin, when, &c. And all, &c. and whatsoever, &c. and chiefly as concerning the fee and right of the manor aforesaid, with the appurtenances. Or thus: And thereof he puts himself upon the great assise of the lord the king, and prays that cognizance may be made, whether he hath greater right to hold the manor aforesaid with the appurtenances to him and his heirs, as tenant thereof by warranty (if he be vouchee) as he holds the same, or the aforesaid demandant to have the manor aforesaid, &c. as he above demands. Or thus: And saith that he hath greater right to hold, &c. And this he is ready to prove by the body of his free
B man,

40 E. 3. 8.
Post. 5. C.

This writ ought to be brought of lands or tenements, B
and not of an advowson, or of common; and lieth only
or

man, whose name is J. R. present here in court, in what manner soever the king's court here shall consider; and he is ready to prove it by another, if any evil happens to J. R. that he be not present; and prays that cognizance may be made, whether, &c.

And Note; The order of joining battle is according to the form of joining the mise, viz. That he has the most or best right. 3 H. 6. 55. Nu. 7. And sometimes by his defence he says, And he is ready to defend his right by his body. 30 Ed. 3. 20.

Note; Tender of the demy or half mark is when the mise or issue on the grand assise is joined before. 22 Ed. 3. 8. See Litt. Sect. 514.

Note also; The form of the writ of right is recited after the count of the demandant, for the tenant to make his defence *de novo*, and thereupon to vouch or plead in bar; and so if the demandant replies to the bar, the tenant shall make a defence *de novo*, and plead to the title. 21 H. 6. 26. per Newton.

3. The Trial of the Grand Assise.] Note, Herle granted an inquest instead of the grand assise, for that the tenements in question were of small value; and a writ issued to the sheriff to elect four men, who were to elect an inquest in nature of the grand assise. 7 Ed. 3. 65. But it seems this was done by consent; for otherwise it cannot be so done, although the demandant prays it. 22 Ed. 3. 8.

The electors ought to elect sixteen knights *gladio cinctos* from amongst themselves and others; and if there are not so many knights in that county, then by the assent of parties they may elect as many valiant serjeants (*i. e.* esquires) by whom they

shall elect three (four) knights from amongst themselves, and the remainder of the serjeants, and process shall issue against all of them by *Venire facias*. 26 Ed. 3. 57.

Yet if at the first day any of the four knights makes default, a *Habeas Corpus* shall issue, and not a summons. Dyer 79.

Note; The writ to the said electors is, That they choose of themselves and others twelve, &c. yet not less than sixteen shall pass in a grand assise, Dyer 98. and if there are not so many knights in the same county, they shall elect them of the next county. See 33 Ed. 1. Fitz. Trial 97.

See the whole form of joining battle in 29 Ed. 3. 12. but in a better form 30 Ed. 3. 20. And see there an imparlance for the demandant, after battle tendred by the tenant; and the different forms of joining battle between the parties and the champions. See 1 H. 6, 7. 13 El. Dyer 301.

4. The Process in a Writ of Right.] In a writ of right the tenant is not demandable till the fourth day after the return, except it be after the mise or issue joined; for in that case he is demandable, and ought to appear on the first day. 24 Ed. 3. 28. 29 Ed. 3. 18. per Thorpe. See also 1 Ed. 3. 1. where, after the mise joined, the parcel was put without day by the king's demise; and at the re-summmons, the tenant was demanded the first day, and for that he made default, his default was recorded, and on the fourth day the demandant prayed seisin, and had the grand cape.

The demandant, after the mise joined by battle or grand assise, ought to offer himself in person, or by attorney, with his champion, &c. and recite

of an estate of fee-simple, and not for him who hath a lesser estate, as tenant in tail, tenant in frank-marriage, or tenant for life: for these tenants shall not have a writ of right patent.

C And this writ lieth properly where a man is seised in fee-simple, and another recovereth the land against him by default in a *præcipe quod reddat*: now he, who hath lost by default, ought to sue this writ. Or if a man seised in fee-simple die seised of such an estate, and a

D stranger doth abate, and entereth into the land, and forceth the heir; the heir may sue this writ against the tenant of the freehold of the same land, or an assise of *Mortdauncester*. *Post*. 196.

E (a) And this writ ought to be brought against him who hath a freehold at least in the land, and not against tenants for years, tenants by statute-merchant, tenants by *elegit*, nor tenants by statute staple; but ought to be brought against those tenants who have an estate in fee-simple in the lands, or an estate-tail, or for term of life at the least.

F And this writ is always patent, and not close, as other writs are. And if the lands be holden of other persons

11 Aff. 17. *per curiam*, a man recovered against the heir by default, and he brought a *Mortdauncester*.

recite the words of the mise the first day after the mise joined, and pray that the tenant be demanded; otherwise a non-suit shall be awarded at the fourth day. 42 Ed. 3. 15. But if after the mise joined a petit cape be awarded returnable *quinden' Mich'*, &c. it is sufficient for the demandant to offer himself the fourth day. *Dyer* 103.

An *Essoin de malo lecti* lies only in a writ of right; and *Note*; in this writ the tenant cannot join the mise by attorney; and therefore, though the tenant has an attorney, yet he may be effoined. 19 H. 6. 61.

Note; The process for the grand assise is a *Venire facias*, and not a *Habeas Corpus*; and yet if they do not appear thereon, they shall be taken. *Dyer* 270.

5. The Judgment on a Writ of

Right.] Judgment final is given against the demandant, and afterwards the grand assise is awarded, the tenant tenders the demy mark for the time, and no seisin is found. 22 Ed. 3. 8. 34 Ed. 3. Judgment 256. But if the seisin be found, they shall inquire further of the right. 3 Ed. 3. *F. Droit* 26. See *Litt. Sect.* 514.

Judgment final was given against the tenants, baron and feme, on a default after the mise joined, *viz.* That the tenant (demandant) should hold to him and his heirs, quit of the baron and feme, and of the heirs of the feme. 22 Ed. 3. 17.

(a) This paragraph seems to be an addition to *Fitzherbert*, and is contrary to B. and C. *supra*, and *Post*. 5 C.

than of the king or of the queen, then this writ shall be directed unto the lord himself, of whom the lands or tenements are so holden, if the lord be not out of the realm; for then it shall be directed unto the lord's bailiff; and then the chancellor of *England* ought to be certified thereof. And if a man be elected bishop, and a writ of right patent is to be sued in the court of the manor of the said bishop, the writ shall be directed unto the bailiffs of the elect, and not unto the elect bishop himself. And this writ is as a commission unto the lord, or unto the bailiff of the manor, that they shall do right. And the form of the writ directed unto the lord himself is such :

Vide post. 2. E.

Vide 2. E.

Henry by the grace of God, &c. to Henry Earl of Lancaster, greeting: *We command you, that without delay you do full right to A. of B. of one messuage and twenty acres of land (b) with the appurtenances in J. which he claims to hold of you by the free service of one penny per annum for all service; of which W. of T. desorceth him; and unless you will do this, let the sheriff of Nottingham do it, that we may hear no more clamour thereupon for want of right. Witness, &c.*

And if the lord be out of the realm, then the form of the writ which shall be directed unto his bailiffs shall be such :

The king (c) to the bailiffs of H. Earl of Derby of the honour of P. in the county of Derby, greeting: We command you, that without delay you do full right to A. of B. of one messuage and twenty acres of land, with the appurtenances in J. which he claims to hold of your said lord by the free service of doing suit at the court of your said lord, of the honour aforesaid in the county aforesaid, from three weeks to three weeks, for all service, &c. as above.

And by that it appeareth, that in a writ of right patent he must express by what services the lands are holden,

(b) Note; In some cases where land is demanded, the writ shall be with the appurtenances. See 19 Ed. 2. Fitz. Bre. 844. and so of an advowson, 5 Ed. 3. Fitz. Bre. 748.

(c) Because, although the suitors are judges, yet the bailiffs shall make the process. Mich. 7 H. 8. Rot. 103. 2 Benl. fol. 5.

Writ of Right Patent.

¶ And if the lands are holden of the king or of the queen, as of an honour, or in burgage, then the writ shall be directed unto the king's or queen's bailiffs, and the writ shall be such :

Henry by the grace of God, King, &c. to his bailiffs of Lincoln, greeting : *We command you, that without delay you do full right to A. of B. of one messuage with the appurtenances in Lincoln, which he claims to hold of us by the free service of one penny per annum for all service, of which W. of B. deforceth him, that we may hear no more clamour thereupon for want of right, &c.*

K And if a man sue a writ of right patent of lands or tenements which are holden by a knight's fee, then the form of the writ shall be : *of one messuage and ten acres of land, &c. which he claims to hold of you by the service of one knight's fee for all service.*

L And the writ of right lieth of a passage over the water of Thames, and of pasture for one hundred sheep, and of the rent of one pound of ginger, thus : *Of one messuage, ten acres of land, nine shillings rent, and passage over the river Thames, and pasture for one hundred sheep, with the appurtenances in W. and of the rent of one pound of ginger, one pound of cinnamon, one rose, one pair of gilt spurs, and of the third part of one garden, with the appurtenances in N. which he claims to hold of us by the free service of himself, together with his partners, finding for us five ships for our passage at our command, for all service, &c.*

A And if the lands of any lord be in the king for the nonage of the heir, and a writ of right is to be brought in the court of the manor where the king hath committed the wardship of the lands to another, the writ of right shall be directed unto the bailiffs of the guardian to whom it is committed, or unto the guardian himself, if he hath the land in ward in his own right, and by reason of the feigniory that the heir is in his ward. And the forms of the writs in the register are thus : *The king to the bailiffs of the guardian of the land and heir of A. of B. Or thus : To the bailiffs of the guardian of the land of A. of B.* And this writ is where the guardian hath only the wardship of the land, and not of the heir, &c. And unto the guardian himself the writ is, *The king to the guardian of the land and heir, greeting : We command you, &c. which*

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Writ of Right Patent.

he claims to hold of the *aforesaid* heir. And if the heir hath no court for the poorness of the land, that it is of so small value, then the writ shall be directed unto the chief lord, as *chief lord*, and not as a guardian; and then the writ shall say, *And which he claims to hold of him, &c.* and shall not say as guardian.

And it appeareth that a man shall have a writ of right of a knight's fee; and the writ shall be such:

The king to A. of B. greeting, &c. We command you that, B &c. W. &c. of the service of one knight's fee, with the appurtenances in W. which he claims to hold, &c. by the service of one pair of gilt spurs for all service, &c. or, by the service of finding an horseman or footman to go with you in the army of Wales at your own expence and cost, &c. for all service. Or thus: By the free service of carrying your writs at your own expence and your own cost within the county, for all service.

And there is an order set in the register, when a man C demandeth divers parcels of land in his writ which are of divers natures, which parcel shall be first specified in the writ, and what parcel shall be next unto that, and then what parcel shall be next to that, and so of all the parcels; and that appeareth by the following paragraph:

Messuage, toft, mill, dove-house, garden, land, meadow, pasture, wood, heath, moor, soil where rushes do grow, marsh, the soil and wood where alders grow, the soil where broom doth grow, rent: This is the order of the parcels.

And if a man in his writ will demand twenty houses, and ten acres of land, and ten acres of meadow, and ten acres of pasture, and divers other parcels; and afterwards in the same writ he will demand the moiety, or the third part of one house, or of one acre of land, or of meadow, or of pasture; then the form of the writ it, to put in the beginning of the writ the whole parcel, and in the end of the writ the moiety or the third part, &c. thus: *That full right, &c. of one messuage, one mill, one garden, the moiety of one messuage, of one acre of land, excepting one acre of land in N. &c.* so as the exception shall always be in the end of the demand.

And a writ of right may be brought against divers D tenants who hold their lands severally; and then the form

8 Aff. 1. 17.
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form of the writ is; *The king to A. B. &c. We command you that, &c. you do full right to A. of twenty acres of land with the appurtenances in N. which he claims, &c. whereof F. deforceth him of ten acres, and S. of three acres, and C. of seven acres of land. And so the word [land] shall be in the end to him that shall be supposed last deforceor, &c.*

E And if a writ of right be brought in the court of any bishop or abbot, it shall be then directed to the same bishop, thus: *The king, &c. to the venerable Father in Christ William, by the same Grace Archbishop of Canterbury, Primate of all England, greeting: We command you that without delay, &c. which he claims to hold of you by free service, &c.* 1. G. 3. A.

And if it be directed unto an abbot, then the writ shall say, *Which he claims to hold of you, &c.*

And if in the time of the vacation of any bishoprick a writ of right shall be brought in the court of any lands which are of the bishoprick, which are in the king's hands by reason of the vacation of the bishoprick, then the writ of right shall be directed unto the king's bailiff, or unto the bailiff of him who is the bishop elect; and the form of the writ is such: *The king to the bailiffs of C. of the archbishoprick of York, greeting. Or thus: The king to the bailiffs of H. (a) elect of Lincoln, &c. greeting: We command you, &c. which he claims to hold of the aforesaid archbishop. Or thus, if it be directed unto the bailiffs of the bishop elect: Which he claims to hold of your aforesaid lord by service, &c.* Ante 1. F.

F But the lord may give licence unto his tenant to sue his writ of right in the king's court, or the common pleas, before the justices; and that as well after the writ purchased and returned into the common pleas, as before the writ purchased and sued. And the form of the writ, when it shall be sued in the common pleas by licence of the lord, shall be such: *The king to the sheriff, &c. command A. that justly, &c. he render to C. one messu-* Licence.

(a) For he ought not to be named the pope, but shall be named only *Bishop* till consecration, not even *Elect*. 5 Ed. 2. Fitz. Brev. 800. though he came in by collation of

Vide 4. D.

age with the appurtenances in M. which he claims to be his right and inheritance, and whereof he complains, that the aforesaid A. hath unjustly deforced him, and unless he will do this, and the aforesaid C. shall give you security to prosecute his suit, then summon by good summoners the aforesaid A. that he be before our justices at Westminster on the fifteenth day of the Holy Trinity, to shew why he will not do it: And have you there the summoners and this writ. *Witness, &c.* Because I. the chief lord of the fee, hath thereupon remitted to us his court. And so this clause shall be put in the writ after the *teste, &c.* And if this clause be omitted, and the lord after the purchase of the writ send his letter to the king that he is contented therewith, it is sufficient.

[3]

And if such clause, *Because the lord hath remitted his court*, were in the writ, it is not material whether there were any letter of the lord in the chancery, proving his assent, or not. And the form of the letter of licence, which shall be certified unto the king, is thus:

To the most excellent Prince Lord Henry by the Grace of A God King of England, Lord of Ireland, and Duke of Aquitaine, the bishop of Durham sendeth greeting, in him by whom kings reign and princes bear dominion. Because K. of S. having obtained our leave, purposeth to implead W. in your court before your justices of the bench by your writ of right, of one messuage with the appurtenances in J. which he holds of us, We signify to your Royal Highness by the tenor of these presents, that for this time we have thereupon remitted to you our court, saving to us otherwise the right of our seigniorie in the like case, if it shall happen. In witness whereof we have caused these our letters to be made patent. Dated at London the day, year, &c.

But if the (a) tenant of any lord sue such a writ of B right in the king's court without such letter, and recover, it seemeth the recovery is good, and the lord shall not void the same nor the tenant. Also it seemeth to stand C with reason, that if a man hold of any lord, as of a seigniorie in gross, which is not any manor, for which seig-

(a) Yet see 6 Ed. 3. 22. He may come in and pray that it be inquired by the inquest, &c.

niory he cannot keep any court; that then the tenant ought to sue such writ as before in the king's court, and that the lord shall not have action, or other means to annul this act, because he hath not any court to hold plea for that there. And in the end of the writ may be these words, *Because the lord hath remitted his court, &c.*

D But if the tenant will sue forth the writ of *præcipe in capite* in the king's court for such lands as are holden of another lord, (b) then the lord shall have a writ out of the chancery directed unto the justices of the common pleas, commanding them, that if it doth not appear unto them that the lands are holden of the king, but of another, they shall proceed no farther on that plea. For by this writ the plea supposeth the lands to be holden of the king, and therefore he and his heirs shall be concluded against the king for the tenure, and the same shall be prejudicial unto the lord of whom the lands are holden: but by the other writ he doth not suppose any tenure in the writ, and therefore there is great diversity. *Tamen quære.*

Præcipe in capite.
Post. 5. A.

E And if a man sue a writ of right directed unto the lord of whom the lands are holden, and he will not hold his court to proceed upon the writ; then the demandant in the writ of right shall have a writ directed unto the lord, commanding him to hold his court, &c. and if he will not receive the writ, nor do right unto him, he may sue forth a writ commanding him to do right, and thereupon he may have an *alias*, and a *pluries*, and *attachment*; and the form of a writ of *attachment* is such:

The king to the sheriff, &c. If A. shall give you security, &c. then put, &c. B. that he be, &c. as well to answer us as the aforesaid A. wherefore when we commanded the said B. by our writ of right, that without delay he should do full right to the aforesaid A. of one messuage with the appurtenances in N. of which T. deforceth him; the said B. little weighing our command in this behalf, hath maliciously suppressed our said writ in favour of the aforesaid T. or thus,

Attachment.

(b) See 6 Ed. 3. 16. *Mag. Char.* of challenge, but only by way of protestation, to save an estoppel of the right shall not alledge this by way tenure. 38 Ed. 3. 31.

hath refused to receive our writ, and to hold his court, and to do justice to the said A. in the premisses, in contempt of us and of our command, and to the great damage and manifest danger of disinheriting the said A. And have, &c. And upon that if the defendant appear, he shall be put to answer, &c.

But if the lord of the court hold his court, but the lord, or the bailiff, or officer will not do him right, or delay him to have right, or to make process, &c. then the demandant may shew unto the sheriff of the county how he is delayed, &c. and pray the sheriff to award such a precept or writ, which is called a *tolt*, directed to his bailiffs, by his precept, to remove the plea before him into his county; and upon that the sheriff ought to award such a precept to his bailiff, &c. and to go unto the lord's court, and there remove the matter before the sheriff in his county. And the form of the precept is such:

Tolt on the lord's default, at the plaintiff's suit. Post. 7. E.

Robert A. sheriff of Norfolk, to Edmund C. the lord the king's bailiff of his dutchy of Lancaster of F. greeting: Because I have received information from the complaint of John B. personally appearing at my county (to wit) on Monday next after, &c. in the year, &c. held in the shire-house at Norwich, that although be brought to J. P. and J. B. bailiffs (of the said lord the king of the dutchy aforesaid) of F. aforesaid, the lord the king's writ of right patent directed to the bailiffs of the said lord the king of his dutchy of Lancaster of F. in my said county, for the purpose that they might do full right to the said John B. of the manor of F. with the appurtenances, whereof John S. deforceth him; yet because the said bailiffs favour the said J. S. in that matter, and have hitherto delayed to do full right according to the exigency of the same writ, I command you, on behalf of the lord the king, firmly enjoining that you go in your proper person to the lord the king's court of his dutchy aforesaid of F. and remove the plaint which is there between the said John B. and John S. by the said writ into my county next to be held, and summon by good summoners the aforesaid John S. that he be at my county of Norfolk, to be held on Monday next coming at N. in the shire-house to answer the aforesaid John B. thereupon; and have you there the aforesaid plaint,
the

the summoners, and this precept. Dated in my county at Norwich in the shire-house, on Monday next after, &c. in the year aforesaid.

G And by this it appeareth, that the demandant may remove the matter out of the lord's court into the county court: and it seems reasonable that the tenant may also remove the matter by a *tolt* made by the sheriff, supposing that the bailiffs of the court do favour the demandant in the matter. *Tamen quære*; for the rule in the register is, that the tenant may remove the plea out of the lord's court for good cause before the justices in the common pleas; but the demandant cannot so do, because he may have a *tolt* from the sheriff to remove it out of the lord's court into the county court.

[4]
Tolt at the tenant's suit.

A But when it is in the county, he may remove it thence by a *recordare* before the justices in the common pleas. And by this rule it seems, that the tenant cannot remove the plea by a *tolt* out of the lord's court into the county, but he ought to remove it into the common pleas by a *recordare*, &c. and that for good cause shewed in the writ. And the writ of *recordare* is such: *The king to the sheriff, &c. greeting: We command you, that taking with you four discreet and lawful knights of your county, you go in your proper person to the court of A. of B. and in that full court you cause to be recorded the plaint, which is in the same court by our writ of right, between W. demandant and S. tenant, of one messuage with the appurtenances in B. and have you that record before our justices at Westminster from the day of Saint Michael in fifteen days, under your seal and the seals of four lawful men of the same court, who intermeddled in that record, and prefix the same day to the parties, that they may be then there to proceed in that plaint, as it shall be just; and have you there the names of the aforesaid four men and this writ. Witness, &c.* And in the end of the writ of *recordare* the cause of removal shall be put in thus: *Because the messuage of the aforesaid T. after the death of the said T. if the said W. die without heir of his body, ought to descend to the bailiff of the court aforesaid, who holds the pleas of the same court, as cousin and next heir of the said W. and the said W. hath deraigned That against the said T. in the court aforesaid; wherefore because the same bailiff favoureth the said W. in the aforesaid plaint,*

Recordare.

as

40 E. 3. 8.
Post. 5. C.

This writ ought to be brought of lands or tenements, B
and not of an advowson, or of common; and lieth only
or

man, whose name is J. R. present here in court, in what manner soever the king's court here shall consider; and he is ready to prove it by another, if any evil happens to J. R. that he be not present; and prays that cognizance may be made, whether, &c.

And Note; The order of joining battle is according to the form of joining the mise, viz. That he has the most or best right. 3 H. 6. 55. Nu. 7. And sometimes by his defence he says, And he is ready to defend his right by his body. 30 Ed. 3. 20.

Note; Tender of the demy or half mark is when the mise or issue on the grand assise is joined before. 22 Ed. 3. 8. See Litt. Sect. 514.

Note also; The form of the writ of right is recited after the count of the demandant, for the tenant to make his defence *de novo*, and thereupon to vouch or plead in bar; and so if the demandant replies to the bar, the tenant shall make a defence *de novo*, and plead to the title. 21 H. 6. 26. per Newton.

3. The Trial of the Grand Assise.] Note, Herle granted an inquest instead of the grand assise, for that the tenements in question were of small value; and a writ issued to the sheriff to elect four men, who were to elect an inquest in nature of the grand assise. 7 Ed. 3. 65. But it seems this was done by consent; for otherwise it cannot be so done, although the demandant prays it. 22 Ed. 3. 8.

The electors ought to elect sixteen knights *gladio cinctos* from amongst themselves and others; and if there are not so many knights in that county, then by the assent of parties they may elect as many valiant serjeants (*i. e.* esquires) by whom they

shall elect three (four) knights from amongst themselves, and the remainder of the serjeants, and process shall issue against all of them by *Venire facias*. 26 Ed. 3. 57.

Yet if at the first day any of the four knights makes default, a *Habeas Corpus* shall issue, and not a summons. Dyer 79.

Note; The writ to the said electors is, That they choose of themselves and others twelve, &c. yet not less than sixteen shall pass in a grand assise, Dyer 98. and if there are not so many knights in the same county, they shall elect them of the next county. See 33 Ed. 1. Fitz. Trial 97.

See the whole form of joining battle in 29 Ed. 3. 12. but in a better form 30 Ed. 3. 20. And see there an imparlance for the demandant, after battle tendred by the tenant; and the different forms of joining battle between the parties and the champions. See 1 H. 6, 7. 13 El. Dyer 301.

4. The Process in a Writ of Right.] In a writ of right the tenant is not demandable till the fourth day after the return, except it be after the mise or issue joined; for in that case he is demandable, and ought to appear on the first day. 24 Ed. 3. 28. 29 Ed. 3. 18. per Thorpe. See also 1 Ed. 3. 1. where, after the mise joined, the parcel was put without day by the king's demise; and at the re-summons, the tenant was demanded the first day, and for that he made default, his default was recorded, and on the fourth day the demandant prayed seisin, and had the grand cape.

The demandant, after the mise joined by battle or grand assise, ought to offer himself in person, or by attorney, with his champion, &c. and recite

of an estate of fee-simple, and not for him who hath a lesser estate, as tenant in tail, tenant in frank-marriage, or tenant for life: for these tenants shall not have a writ of right patent.

C And this writ lieth properly where a man is seised in fee-simple, and another recovereth the land against him by default in a *præcipe quod reddat*: now he, who hath lost by default, ought to sue this writ. Or if a man seised in fee-simple die seised of such an estate, and a

D stranger doth abate, and entereth into the land, and deforceth the heir; the heir may sue this writ against the tenant of the freehold of the same land, or an assise of *Mortdauncester*. *Post*. 196.

E (a) And this writ ought to be brought against him who hath a freehold at least in the land, and not against tenants for years, tenants by statute-merchant, tenants by *elegit*, nor tenants by statute staple; but ought to be brought against those tenants who have an estate in fee-simple in the lands, or an estate-tail, or for term of life at the least.

F And this writ is always patent, and not close, as other writs are. And if the lands be holden of other persons

11 Ass. 17. *per curiam*, a man recovered against the heir by default, and he brought a *Mortdauncester*.

recite the words of the mise the first day after the mise joined, and pray that the tenant be demanded; otherwise a non-suit shall be awarded at the fourth day. 42 Ed. 3. 15. But if after the mise joined a petit cape be awarded returnable *quinden' Mich'*, &c. it is sufficient for the demandant to offer himself the fourth day. *Dyer* 103.

An *Essoin de malo lecti* lies only in a writ of right; and *Note*; in this writ the tenant cannot join the mise by attorney; and therefore, though the tenant has an attorney, yet he may be essoined. 19 H. 6. 61.

Note; The process for the grand assise is a *Venire facias*, and not a *Habeas Corpus*; and yet if they do not appear thereon, they shall be taken. *Dyer* 270.

5. The Judgment on a Writ of

Right.] Judgment final is given against the demandant, and afterwards the grand assise is awarded, the tenant tenders the demy mark for the time, and no seisin is found. 22 Ed. 3. 8. 34 Ed. 3. Judgment 256. But if the seisin be found, they shall inquire further of the right. 3 Ed. 3. *F. Droit* 26. See *Litt. Sect.* 514.

Judgment final was given against the tenants, baron and feme, on a default after the mise joined, *viz.* That the tenant (demandant) should hold to him and his heirs, quit of the baron and feme, and of the heirs of the feme. 22 Ed. 3. 17.

(a) This paragraph seems to be an addition to *Fitzherbert*, and is contrary to B. and C. *supra*, and *Post*. 5 C.

than of the king or of the queen, then this writ shall be directed unto the lord himself, of whom the lands or tenements are so holden, if the lord be not out of the realm; for then it shall be directed unto the lord's bailiff; and then the chancellor of *England* ought to be certified thereof. And if a man be elected bishop, and a writ of right patent is to be sued in the court of the manor of the said bishop, the writ shall be directed unto the bailiffs of the elect, and not unto the elect bishop himself. And this writ is as a commission unto the lord, or unto the bailiff of the manor, that they shall do right. And the form of the writ directed unto the lord himself is such:

Vide post. 2. E.

Vide 2. E.

Henry by the grace of God, &c. to Henry Earl of Lancaster, greeting: *We command you, that without delay you do full right to A. of B. of one messuage and twenty acres of land (b) with the appurtenances in J. which he claims to hold of you by the free service of one penny per annum for all service; of which W. of T. deforceth him; and unless you will do this, let the sheriff of Nottingham do it, that we may hear no more clamour thereupon for want of right. Witness, &c.*

And if the lord be out of the realm, then the form of the writ which shall be directed unto his bailiffs shall be such:

The king (c) to the bailiffs of H. Earl of Derby of the honour of P. in the county of Derby, greeting: We command you, that without delay you do full right to A. of B. of one messuage and twenty acres of land, with the appurtenances in J. which he claims to hold of your said lord by the free service of doing suit at the court of your said lord, of the honour aforesaid in the county aforesaid, from three weeks to three weeks, for all service, &c. as above.

And by that it appeareth, that in a writ of right patent he must express by what services the lands are holden,

(b) Note; In some cases where land is demanded, the writ shall be *with the appurtenances*. See 19 Ed. 2. Fitz. Bre. 844. and so of an advowson, 5 Ed. 3. Fitz. Bre. 748.

(c) Because, although the suitors are judges, yet the bailiffs shall make the process. Mich. 7 H. 8. Rot. 103. 2 Benl. fol. 5.

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Et. And if the lands are holden of the king or of the queen, as of an honour, or in burgage, then the writ shall be directed unto the king's or queen's bailiffs, and the writ shall be such :

Henry by the grace of God, King, &c. to his bailiffs of Lincoln, greeting : *We command you, that without delay you do full right to A. of B. of one messuage with the appurtenances in Lincoln, which he claims to hold of us by the free service of one penny per annum for all service, of which W. of B. deforceth him, that we may hear no more clamour thereupon for want of right, &c.*

K And if a man sue a writ of right patent of lands or tenements which are holden by a knight's fee, then the form of the writ shall be : *of one messuage and ten acres of land, &c. which he claims to hold of you by the service of one knight's fee for all service.*

L And the writ of right lieth of a passage over the water of Thames, and of pasture for one hundred sheep, and of the rent of one pound of ginger, thus : *Of one messuage, ten acres of land, nine shillings rent, and passage over the river Thames, and pasture for one hundred sheep, with the appurtenances in W. and of the rent of one pound of ginger, one pound of cinnamon, one rose, one pair of gilt spurs, and of the third part of one garden, with the appurtenances in N. which he claims to hold of us by the free service of himself, together with his partners, finding for us five ships for our passage at our command, for all service, &c.*

A And if the lands of any lord be in the king for the nonage of the heir, and a writ of right is to be brought in the court of the manor where the king hath committed the wardship of the lands to another, the writ of right shall be directed unto the bailiffs of the guardian to whom it is committed, or unto the guardian himself, if he hath the land in ward in his own right, and by reason of the feignory that the heir is in his ward. And the forms of the writs in the register are thus : *The king to the bailiffs of the guardian of the land and heir of A. of B. Or thus : To the bailiffs of the guardian of the land of A. of B.* And this writ is where the guardian hath only the wardship of the land, and not of the heir, &c. And unto the guardian himself the writ is, *The king to the guardian of the land and heir, greeting : We command you, &c. which*

[2]

Writ of Right Patent.

he claims to hold of the *aforesaid* heir. And if the heir hath no court for the poorness of the land, that it is of so small value, then the writ shall be directed unto the chief lord, as *chief lord*, and not as a guardian; and then the writ shall say, *And which he claims to hold of him, &c.* and shall not say as guardian.

And it appeareth that a man shall have a writ of right of a knight's fee; and the writ shall be such:

The king to A. of B. greeting, &c. We command you that, B &c. W. &c. of the service of one knight's fee, with the appurtenances in W. which he claims to hold, &c. by the service of one pair of gilt spurs for all service, &c. or, by the service of finding an horseman or footman to go with you in the army of Wales at your own expence and cost, &c. for all service. Or thus: By the free service of carrying your writs at your own expence and your own cost within the county, for all service.

And there is an order set in the register, when a man C demandeth divers parcels of land in his writ which are of divers natures, which parcel shall be first specified in the writ, and what parcel shall be next unto that, and then what parcel shall be next to that, and so of all the parcels; and that appeareth by the following paragraph:

Messuage, toft, mill, dove-house, garden, land, meadow, pasture, wood, heath, moor, soil where rushes do grow, marsh, the soil and wood where alders grow, the soil where broom doth grow, rent: This is the order of the parcels.

And if a man in his writ will demand twenty houses, and ten acres of land, and ten acres of meadow, and ten acres of pasture, and divers other parcels; and afterwards in the same writ he will demand the moiety, or the third part of one house, or of one acre of land, or of meadow, or of pasture; then the form of the writ it, to put in the beginning of the writ the whole parcel, and in the end of the writ the moiety or the third part, &c. thus: *That full right, &c. of one messuage, one mill, one garden, the moiety of one messuage, of one acre of land, excepting one acre of land in N. &c.* so as the exception shall always be in the end of the demand.

And a writ of right may be brought against divers D tenants who hold their lands severally; and then the form

8 Aff. 1. 17.
16 Aff. 46.
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Dyer 3 4.
3 Mar. 169.

form of the writ is; *The king to A. B. &c. We command you that, &c. you do full right to A. of twenty acres of land with the appurtenances in N. which he claims, &c. whereof F. deforceth him of ten acres, and S. of three acres, and C. of seven acres of land. And so the word [land] shall be in the end to him that shall be supposed last deforceor, &c.*

E And if a writ of right be brought in the court of any bishop or abbot, it shall be then directed to the same bishop, thus: *The king, &c. to the venerable Father in Christ William, by the same Grace Archbishop of Canterbury, Primate of all England, greeting: We command you that without delay, &c. which he claims to hold of you by free service, &c.* 1. G. 3. A.

And if it be directed unto an abbot, then the writ shall say, *Which he claims to hold of you, &c.*

And if in the time of the vacation of any bishoprick a writ of right shall be brought in the court of any lands which are of the bishoprick, which are in the king's hands by reason of the vacation of the bishoprick, then the writ of right shall be directed unto the king's bailiff, or unto the bailiff of him who is the bishop elect; and the form of the writ is such: *The king to the bailiffs of C. of the archbishoprick of York, greeting. Or thus: The king to the bailiffs of H. (a) elect of Lincoln, &c. greeting: We command you, &c. which he claims to hold of the aforesaid archbishop. Or thus, if it be directed unto the bailiffs of the bishop elect: Which he claims to hold of your aforesaid lord by service, &c.* Ante 1. F.

F But the lord may give licence unto his tenant to sue his writ of right in the king's court, or the common pleas, before the justices; and that as well after the writ purchased and returned into the common pleas, as before the writ purchased and sued. And the form of the writ, when it shall be sued in the common pleas by licence of the lord, shall be such: *The king to the sheriff, &c. command A. that justly, &c. he render to C. one messu-* Licence.

(a) For he ought not to be named the pope, but shall be named only *Bishop* till consecration, not even *Elect*. 5 Ed. 2. Fitz. Brev. 800. though he came in by collation of

Vide 4. D.

age with the appurtenances in M. which he claims to be his right and inheritance, and whereof he complains, that the aforesaid A. hath unjustly deforced him, and unless he will do this, and the aforesaid C. shall give you security to prosecute his suit, then summon by good summoners the aforesaid A. that he be before our justices at Westminster on the fifteenth day of the Holy Trinity, to shew why he will not do it: And have you there the summoners and this writ. *Witness, &c.* Because I. the chief lord of the fee, hath thereupon remitted to us his court. And so this clause shall be put in the writ after the *teste, &c.* And if this clause be omitted, and the lord after the purchase of the writ send his letter to the king that he is contented therewith, it is sufficient.

[3]

And if such clause, *Because the lord hath remitted his court*, were in the writ, it is not material whether there were any letter of the lord in the chancery, proving his assent, or not. And the form of the letter of licence, which shall be certified unto the king, is thus:

To the most excellent Prince Lord Henry by the Grace of A God King of England, Lord of Ireland, and Duke of Aquitaine, the bishop of Durham sendeth greeting, in him by whom kings reign and princes bear dominion. Because K. of S. having obtained our leave, purposeth to implead W. in your court before your justices of the bench by your writ of right, of one messuage with the appurtenances in J. which he holds of us, We signify to your Royal Highness by the tenor of these presents, that for this time we have thereupon remitted to you our court, saving to us otherwise the right of our seigniorie in the like case, if it shall happen. In witness whereof we have caused these our letters to be made patent. Dated at London the day, year, &c.

But if the (a) tenant of any lord sue such a writ of B right in the king's court without such letter, and recover, it seemeth the recovery is good, and the lord shall not void the same nor the tenant. Also it seemeth to stand C with reason, that if a man hold of any lord, as of a seigniorie in gross, which is not any manor, for which seig-

(a) Yet see 6 Ed. 3. 22. He may come in and pray that it be inquired by the inquest, &c.

niory he cannot keep any court; that then the tenant ought to sue such writ as before in the king's court, and that the lord shall not have action, or other means to annul this act, because he hath not any court to hold plea for that there. And in the end of the writ may be these words, *Because the lord hath remitted his court, &c.*

D But if the tenant will sue forth the writ of *præcipe in capite* in the king's court for such lands as are holden of another lord, (b) then the lord shall have a writ out of the chancery directed unto the justices of the common pleas, commanding them, that if it doth not appear unto them that the lands are holden of the king, but of another, they shall proceed no farther on that plea. For by this writ the plea supposeth the lands to be holden of the king, and therefore he and his heirs shall be concluded against the king for the tenure, and the same shall be prejudicial unto the lord of whom the lands are holden: but by the other writ he doth not suppose any tenure in the writ, and therefore there is great diversity. *Tamen quære.*

Præcipe in capite.
Post. 5. A.

E And if a man sue a writ of right directed unto the lord of whom the lands are holden, and he will not hold his court to proceed upon the writ; then the demandant in the writ of right shall have a writ directed unto the lord, commanding him to hold his court, &c. and if he will not receive the writ, nor do right unto him, he may sue forth a writ commanding him to do right, and thereupon he may have an *alias*, and a *pluries*, and *attachment*; and the form of a writ of *attachment* is such:

The king to the sheriff, &c. If A. shall give you security, &c. then put, &c. B. that he be, &c. as well to answer us as the aforesaid A. wherefore when we commanded the said B. by our writ of right, that without delay he should do full right to the aforesaid A. of one messuage with the appurtenances in N. of which T. deforceth him; the said B. little weighing our command in this behalf, hath maliciously suppressed our said writ in favour of the aforesaid T. or thus,

Attachment.

(b) See 6 Ed. 3. 16. *Mag. Char.* c. 24. But the tenant in a writ of right shall not alledge this by way of challenge, but only by way of protestation, to save an estopple of the tenure. 38 Ed. 3. 31.

Writ of Right Patent.

bath refused to receive our writ, and to hold his court, and to do justice to the said A. in the premisses, in contempt of us and of our command, and to the great damage and manifest danger of disinheriting the said A. And have, &c. And upon that if the defendant appear, he shall be put to answer, &c.

But if the lord of the court hold his court, but the lord, or the bailiff, or officer will not do him right, or delay him to have right, or to make process, &c. then the demandant may shew unto the sheriff of the county how he is delayed, &c. and pray the sheriff to award such a precept or writ, which is called a *tolt*, directed to his bailiffs, by his precept, to remove the plea before him into his county; and upon that the sheriff ought to award such a precept to his bailiff, &c. and to go unto the lord's court, and there remove the matter before the sheriff in his county. And the form of the precept is such:

Tolt on the lord's default, at the plaintiff's suit. Post. 7. E.

Robert A. *sheriff of Norfolk, to Edmund C. the lord the king's bailiff of his dutchy of Lancaster of F. greeting: Because I have received information from the complaint of John B. personally appearing at my county (to wit) on Monday next after, &c. in the year, &c. held in the shire-house at Norwich, that although be brought to J. P. and J. B. bailiffs (of the said lord the king of the dutchy aforesaid) of F. aforesaid, the lord the king's writ of right patent directed to the bailiffs of the said lord the king of his dutchy of Lancaster of F. in my said county, for the purpose that they might do full right to the said John B. of the manor of F. with the appurtenances, whereof John S. deforceth him; yet because the said bailiffs favour the said J. S. in that matter, and have hitherto delayed to do full right according to the exigency of the same writ, I command you, on behalf of the lord the king, firmly enjoining that you go in your proper person to the lord the king's court of his dutchy aforesaid of F. and remove the plaint which is there between the said John B. and John S. by the said writ into my county next to be held, and summon by good summoners the aforesaid John S. that he be at my county of Norfolk, to be held on Monday next coming at N. in the shire-house to answer the aforesaid John B. thereupon; and have you there the aforesaid plaint,*
the

the summoners, and this precept. Dated in my county at Norwich in the shire-house, on Monday next after, &c. in the year aforesaid.

G And by this it appeareth, that the demandant may remove the matter out of the lord's court into the county court: and it seems reasonable that the tenant may also remove the matter by a *tolt* made by the sheriff, supposing that the bailiffs of the court do favour the demandant in the matter. *Tamen quære*; for the rule in the register is, that the tenant may remove the plea out of the lord's court for good cause before the justices in the common pleas; but the demandant cannot so do, because he may have a *tolt* from the sheriff to remove it out of the lord's court into the county court.

[4]
Tolt at the tenant's suit.

A But when it is in the county, he may remove it thence by a *recordare* before the justices in the common pleas. And by this rule it seems, that the tenant cannot remove the plea by a *tolt* out of the lord's court into the county, but he ought to remove it into the common pleas by a *recordare*, &c. and that for good cause shewed in the writ. And the writ of *recordare* is such: *The king to the sheriff, &c. greeting: We command you, that taking with you four discreet and lawful knights of your county, you go in your proper person to the court of A. of B. and in that full court you cause to be recorded the plaint, which is in the same court by our writ of right, between W. demandant and S. tenant, of one messuage with the appurtenances in B. and have you that record before our justices at Westminster from the day of Saint Michael in fifteen days, under your seal and the seals of four lawful men of the same court, who intermeddled in that record, and prefix the same day to the parties, that they may be then there to proceed in that plaint, as it shall be just; and have you there the names of the aforesaid four men and this writ. Witness, &c.* And in the end of the writ of *recordare* the cause of removal shall be put in thus: *Because the messuage of the aforesaid T. after the death of the said T. if the said W. die without heir of his body, ought to descend to the bailiff of the court aforesaid, who holds the pleas of the same court, as cousin and next heir of the said W. and the said W. hath deraigned That against the said T. in the court aforesaid; wherefore because the same bailiff favoureth the said W. in the aforesaid plaint,*
as

as it is said, let execution of this writ be done, if the cause be true, and the aforesaid S. prays this, and otherwise not.

V. 3. H. 4. 14.
12 H. 4. 13. &
17.
1 H. 7. 30.
1 & 2 P. & Ma.
Dyer 111.
Pone.
35 Ed. 3.
Droit 30.
Post 7 E.

And there are many other cases put in the register of B remover of this plea into the common pleas at the suit of the tenant. As if the lord take upon him for to maintain the matter, to have part of the land. Or if the tenant alledges bastardy, or plead a foreign plea, or join the mise upon the grand assise, &c. And when the demandant hath removed the plea by *tolt* into the county, then the demandant may remove the same (a) into the common pleas by a *pone*, without expressing any cause in the *pone*. But the tenant cannot remove it without a cause be expressed in the *pone*.

Recordare.
Post 7 E.

And it is a rule, that a *recordare* is not given to remove C any plea in a writ of right, but for the tenant. But *pone* is given for the demandant, but that ought to be out of the county court. And the form of the *pone* for the demandant is such:

The king to the sheriff, &c. greeting: At the petition of the demandant put the plaint which is in your county by our writ of right between A. demandant and T. tenant, of one messuage with the appurtenances in T. before our justices at Westminster on the octave of the Holy Trinity next coming, and summon by good summoners the aforesaid T. that he be then there to answer the aforesaid A. thereupon; and have you there the summoners and this writ.

And here is not said [and another writ] because the original D writ of right patent doth remain with the demandant, and not with the sheriff, &c. as do other original writs.

And if the tenant will remove the plea out of the county by *pone*, he ought to shew some cause in the writ; and the writ is such: *The king to the sheriff, &c. Put the plaint which is in your county, &c. before our justices at Westminster in fifteen days of the Holy Trinity next coming, &c. as above; and tell the aforesaid A. that he may be then there, if he will, to prosecute his plaint thereupon against the aforesaid T. and have you then there this writ. Witness, &c. Because the aforesaid A. hath married W. the kinswoman of the sheriff, &c.*

(a) Note; In such case the plea *ford*; and there they may proceed may be removed into B. R. per Hank- thereon. 11 H. 4. 49.

wherefore

wherefore because the sheriff favoureth, &c. let execution be done, &c. as above.

E And in a writ of right in a court baron, if a foreign plea be pleaded, or the mise is joined to be tried by the grand assise; (a) now if the bailiffs will proceed, the tenant may have a prohibition directed unto them, which shall inhibit the bailiffs to hold the plea. Or he may inhibit the lord himself, that he shall not hold the plea, &c. And also such writ shall be directed unto the sheriff, forbidding him to hold plea in the county court upon the writ of right after such pleas pleaded; and if they do proceed, he may sue forth an *alias*, and a *pluries*, and an *attachment* against them. Prohibition.

F And it is to be known, that if the lord or bailiffs do cease to proceed in the plea by reason of such writ of prohibition, then when the justices in eyre come into the county for all pleas, the demandant may come into the chancery by the record of the writ of prohibition, which issued before out of the chancery, which is always inrolled in the chancery: and thereupon he shall have a writ directed unto the sheriff to summon four knights to chuse the grand assise upon the writ of right which is in the lord's court, or in the county. And the writ of chusing the grand assise shall be such:

(b) *The king to the sheriff, &c. greeting: Summon by good summoners four lawful knights of your county, that they be before our justices at the first assises, when they shall come into those parts, to elect twelve of the lawful knights of the neighbourhood of N. who may better know and will speak the truth, to make cognizance of our great assise between A. demandant and B. tenant, of one messuage with the appurtenances in N. whereupon the same B. who is tenant, hath put himself upon our great assise, and hath prayed that cognizance may be made, whether of them hath greater right in the messuage aforesaid, and summon by good summoners the aforesaid B. that he be then there to*

(a) See this otherwise in the court of antient demesne, where in a writ of right close sued, in nature of a writ of right patent, a jury was returned there, instead of the grand

assise. 2 Mar. Dyer. 111.

(b) Note; The knights ought to be girded with swords, otherwise it is cause of challenge. See Trin. 6 Eliz. Moor's Reports 67. Squire and Read. hear

hear that election; and have you there the names of the afore-
said knights and this writ. And when the plea is in the
common pleas, then this writ of *magna assisa eligenda* shall
issue out of the common pleas, and is judicial: but in the
case before it shall issue out of the chancery without paying
a fine. And if the demandant sue a writ of *præcipe in* **A**
capite in the common pleas for lands holden of another
lord than of the king, then the lord of whom the lands
are holden, may sue forth a writ directed unto the justices
of the common pleas, rehearsing how that the land is
holden of him, commanding them to proceed no further,
&c. **B**

Ant. 3 D.

Ant. 1 B.

And as before is said, none can sue or maintain such **C**
writ of right patent, but they who have an estate in fee-
simple, as tenant in fee-simple, or abbot, or prior, or
bishop, or master of an hospital; and a body politick, as
mayor and commonalty, or bailiffs and commonalty, &c.
and such bodies politick may have such writs for their
possessions. But parsons, vicars, or chantery priests or
prebendaries, who have patrons and ordinaries over them,
cannot maintain this *writ of right patent*, but another writ,
which is called *juris utrum*; the nature of which writ
shall be after expressed.

If a man bring a *writ of right patent* as heir unto his an- **D**
cestor, he ought to lay the seisin and esplees, as in per-
nancy of the profits of the lands in his ancestors. And if
an abbot, bishop, or such body politick, bring such writ,
he ought to lay the seisin of the esplees as in pernancy of
the profits in themselves, or in their predecessors. And
for the residue of this matter touching the *writ of right*
patent, and the count, and the bars, and all the circum-
stances thereof, see the title of *droit* in the abridgements.

Præcipe in capite.
Ant. 3. D.

And note, that a writ of right, which is called *præcipe* **E**
in capite, is no *writ of right patent*, but is a writ of right
close, and shall be directed unto the sheriff of the county,
and lieth where the king's tenant, who is seised in fee-
simple of lands holden of the king in chief as of his crown,
and not of the king as of any honour, castle, or manor,
but merely of the king as of his crown, who is a lord in
gross, (because it is holden of him who is always king) is **F**
deforced &c. And this writ is as high in its nature as the
writ

31 H. 8.
Dyer 44, 45.

writ of right patent ; and no person can sue this writ, if he hath not an estate in fee-simple of his own possession and seisin, or of the seisin of his ancestor or predecessor.

G And it lieth also where tenant in fee-simple of any lands or tenements, who holdeth such land or tenement of the king in chief as of his crown, and not of the king as of any honour, castle, or manor, loseth his lands or tenements by default in a *præcipe quod reddat* : Now he or his heir may have this writ of right, of *præcipe in capite*, against the tenant of the freehold of those lands or tene-

H ments. And this writ shall be close, and shall be directed unto the sheriff, and returnable in the common pleas before the justices there : and in this writ he ought to lay the seisin in himself, or in his ancestor or predecessor, in the same form as he shall do in a writ of right.

I *The king to the sheriff of Nottinghamshire, &c. Command A. that justly, &c. he render to B. one messuage with the appurtenances in D. which he claimeth to be his right and inheritance, and to hold of us in chief, and whereof he complains that the aforesaid A. unjustly desorceth him ; and unless he will do this, and the aforesaid B. shall give you security to prosecute his claim, then summon by good summoners the aforesaid A. that, &c. Or thus, if an abbot or spiritual person sue the writ : which he claims to be the right of his church of Saint Mary of N. and to hold of us in chief, and whereof he complains, &c.*

K And by this writ it fully appears, that lands which are holden of the king as of an honour, castle, or manor, are not holden *in capite* of the king, because that the writ of right in such case shall be directed unto the bailiff of the honour, or castle, or manor, to do right, &c. But when the lands are holden of the king as of the crown, they are not holden of any manor, castle, or honour, but merely of the king as king, and of the king's crown as of a feigniory (a) by itself in gross, and in chief above all other

Bro. Livery 57.
Prerog. R. 29.
B.
V. 21 E. 3. B.
Tenures, 16.
33 H. 8. 52.
there are some
honours of
which lands are
holden *in capite*.
Dyer 45.

(a) Note ; M. 30 H. 8. Dyer 44.
A tenure in chief (1.) ought to be held of the king, and created by him. (2.) It ought to be held of him as of his person. And (3.) per Dyer 45.

The king by no means can grant or sever the tenure and *seigniorie* in chief from the crown. The king purchases a mesnalty, yet the tenant shall hold as before ; so if he forejudge the mesne,

other feignories. And thereof it followeth, that there are many errors and erroneous opinions at this day in the suing of liveries, and finding of offices, and determining which lands shall be taken to be holden of the king in chief, and which not; and therefore *quære* to know the truth.

38 E. 3. 13.
Br. Droit de
recto 9.
F. Droit 5.

In *præcipe in capite* the tenant shall not plead, that the L
tenements are not holden of the king, although the writ doth so suppose; but he ought to take the same by protestation, and plead other matter in bar, if he have any matter to plead.

And in a writ of right he ought to count of his own M
seisin, or of the seisin of his ancestor: and if he count of the seisin of his ancestor, he may alledge the seisin in the time of King *Richard* the First, but the seisin is not traversable: but the tenant may tender a demy mark to inquire of this seisin, &c. And if it be found with the tenant, that the ancestor was not seised, the demandant shall be barred. But if the king be party demandant, the tenant cannot tender the demy mark to inquire of the seisin, but ought to plead in bar; and there the tenant shall have no imparlance without the assent of the king's serjeants. And it seems reasonable, if the tenant in a *præcipe quod reddat* lose by action tried, that yet he shall have a writ of right.

Litt. 114.

4 Co. 43.

[6]

5 Co. 86.

If the tenant after the mise joined maketh default, final judgment upon that default shall not be given, but a *petit cape* shall issue; for peradventure he may save his default: but judgment final, where it ought not to be in a writ of right, shall bind until it be reversed.

And so if the demandant be barred in an assise of Mort- N
dauncester brought by him, or other real action, as a writ of entry *sur disseisin*, &c. or the like writ, and is barred by action tried, yet he shall have a writ of right patent, or *præcipe in capite*, if the lands be holden of the king in chief: and so it seemeth, if a man lose by default in a

mesne, &c. he shall hold as the mesne held. The king grants land in tail, and after confirms it to hold of him by a penny, &c. The grantee shall notwithstanding hold it in chief, although there are these words added, *and not in chief*; and if he grant the

reversion, both the tenure and the services shall remain to the king. See the tenure of the honour of *Plympton*, and 36 H. 8. *Dyer* 58. The tenure of the honour of *Gloucester*; and Note, the tenure of the principality of *Wales*, is not the same. *Dyer* 344.

writ

writ of right (a) before the mise joined, yet he shall have a writ of right against him who recovereth. But after a mise joined it is otherwise; for then upon default after issue joined, the judgment shall be final, as well against the demandant by his nonsuit, as against the tenant, if he make default after.

A And a man shall have a writ of right patent of a rent, as well as of land.

This must be intended of a Rent-Service, for of a rent-

charge or seck no writ of right lies; *per Herle.* 45 Ed. 3. F. Droit 32.

Writ of Right in London.

WRIT of right patent in London lieth of lands or tenements within the city, &c. by him who claims an estate in fee-simple in the lands and tenements, and not by

(a) The demandant imparls on the voucher of the tenant and returns (into court) and the tenant was demanded and made default, and judgment given against him, *because he departed in contempt of the court.* 38 Ed. 3. 13. and so of the demandant if he imparls, &c. after the mise joined. 13 Ed. 3. F. Judgment 169. and the like of the tenant, 11 Ed. 3. F. Judgment 126. Judgment final is given on a departure in despite of the court. 53 Ed. 3. F. Judgment 252. But not on a default in a petit cape after the mise joined. 12 Ed. 2. F. Judgment 235. So judgment final is given on a confession after the mise joined, but not before. 13 H. 4. F. Judgment 245. 33 Ed. 3. *ibid.* 253.

Where the tenant vouches, final judgment shall not be given against the vouchee, except he be tenant to him that vouches him, though it be after the mise joined; *per Bingham.* 13 Ed. 3. Judgment 152. *contr.* 14 Ed. 3. *ibid.* 154. See judgment against a prebend. 12 Ed. 3. Judgment 163. against a baron and feme; and yet the feme shall afterwards have a *cui in*

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vita. 33 Ed. 3. *ibid.* 252. It shall not be against the king. *ibid.* Judgment 232. See judgment final given after the champions were brought, and at another day given, the tenant made default; but the demandant appeared with his champion. 29 Ed. 3. 12. and so is 1 H. 6. 7.

* Judgment in a writ of right, *vide ant.* pag. 1. and 2. & *infra* †.

† Note; If the tenant tenders the mise, either by grand assise or champion, and the demandant imparls thereupon, and at the day the tenant makes default; judgment final shall be given, *because he departed in contempt of the court.* 3 H. 6. 55. 10 H. 6. 2. and so is the case to be intended. 44 Ed. 3. 28. *Vide supra*.* So if after the mise is joined by champion, the tenant appears without his champion. 12 H. 7. 10. But if the mise is joined by grand assise or battle, and afterwards the plea is put without day, *i. e.* discontinued; and then upon a re-summors the tenant afterwards makes default, judgment final shall not be given. 3 Ed. 3. 5. 1 Ed. 3. Also if the mise is joined by grand assise,

C

by him who claims an estate for life, or in tail, or in dower, or by the courtesy. For if tenant in fee-simple loseth his lands in *London* by default, or by verdict, it seemeth that he shall have a writ of right of those lands directed unto the mayor and sheriffs, and it shall be in the nature as a *writ of right patent*. And the form of the writ is such :

The king to the mayor and sheriffs of London, greeting : C
We command you, that without delay you do full right to E.
of N. of one messuage and two shops with the appurtenances in
London, which he claims to hold of us by free service, &c.
whereof W. deforceth him, that we may hear no more clamour
thereupon for want of right. Witness, &c. And it shall
not be said in this writ, and unless you will do this, the
sheriff of such a county shall do it, because the writ is as well
unto the mayor of the said city as unto the sheriff.

And the *writ of right patent*, which shall be directed unto another city or borough, shall be of like form as the writ aforesaid is, as appeareth by the register, thus :

The king to the mayor and bailiffs of Oxford, greeting :
We command you, that without delay you do full right, &c. to
E. of C. of twenty shillings rent, and pasture for sixteen
cattle, with the appurtenances in N. of which A. of B. un-
justly deforceth him, &c.

Burgage Tenure.

And because that the lands and tenements within cities D
 and boroughs are holden of the king in burgage tenure, it behoveth that the *writ of right patent* be directed unto the said mayor and sheriffs or bailiffs, as bailiffs and officers of the king, as if lands were holden of the king as of an honour, or castle, or manor.

Note ; All the
lands, &c. with-
in the city of

London, and the liberties thereof, are held in free burgage without any mesnalty. Privileg. Lond. 72.

assise, and at the day of *nisi prius*, &c. the tenant makes default, a petit cape shall issue ; and if at the return thereof the tenant does not come in, nor save his default, judgment final shall (not) be ; but if the demandant makes default at any day after the mise joined, judgment final shall be given against him. See 12 *H.* 7. 10. or 20. *Dyer* 98. 103. 5 *Co.* 86. a. See 3 *Ed.* 3. 29. If in a writ of right against

baron and feme, they tender the mise, and the demandant imparls thereupon, and afterwards makes default, judgment final shall be given.

Note ; Where it was against baron and feme, and before the mise accepted. 11 *Ed.* 3. F. *Judgment* 126. 13 *Ed.* 3. *ibid.* 129. acc'. where the termor was received. And 14 *Ed.* 3. 151. *Simile.* *Vide post.* 11 *D.* E.

Writ of Right in London.

E And also upon a writ of right sued in *London* the plea shall not be removed by (a) *Tolt*, or *Pone*, or *Recordare*, as another writ of right sued in the court of another lord shall be. But if the tenant in the *writ of right in London* vouch a foreigner to warranty, the demandant shall come into the (a) Chancery, and shall sue a *summ' ad warrantizandum* in the common pleas before the justices at a certain day, and another writ unto the (b) mayor and sheriffs, to send the record before the said justices at the same day, &c. and then the mayor and sheriffs do adjourn the parties before the justices of the Common Pleas at a certain day; and also at the same day shall send the record which is before them before the said justices; and when the justices have determined the warranty, they shall (a) send back the record by writ, which shall issue out of the rolls of the justices, directed unto the mayor and sheriffs, commanding them to proceed in the plea within the said city. And the same is by the statute of *Gloucester, Of Foreign Voucher to Warranty, cap. 12.* And so it shall be done, if the tenant plead a foreign plea, (a) the plea shall be removed as aforesaid, and when the matter (a) of the plea is determined, then it shall be sent back unto the mayor and sheriffs as aforesaid, by the equity of the said statute.

And

(a) *N. B.* That at common law the record was removed by a writ out of Chancery, and after the warranty determined, it was remanded back; *per Hankford. 14 H. 4. 26.*

(b) See the power of the justices on such removal of the record. *44 Ed. 3. 2.* They may record an aid prayer for the tenant, and remand the record. *18 Ed. 3. 1.* They may grant a resceit to the wife on a departure of the husband, in despite of the court. *Contra 31 Ed. 3. F. Resceit 125.* But they cannot give judgment upon a default. *Ibid. 41 Ed. 3. 31. 42 Ed. 3. 1.* Nor give judgment upon a confession; nor take an issue between the tenant and vouchee; nor

enter the confession, &c. *18 Ed. 3. 1.*

A vouchee cannot plead in bar, but may vouch over a foreigner; *per Kelf. contra Stouff;* and *49 Ed. 3. 31. per Wich. and Bale. See 41 Ed. 3. 31. and 49 Ed. 3. 21.* They cannot try a new issue pleaded by the tenant to the writ.

(a) *Id est,* In a plea real, but not in a plea personal; *per Frisby. 3 H. 4. 12.* But on a foreign plea pleaded in a plea real or personal it shall be removed to be tried, and afterwards remanded, by the better opinion. *Ibid.* And so it is on a foreign plea pleaded in a court baron, or antient demesne, or county palatine. *14 H. 4. 25, 26. 22 H. 6. 48. Lib. In- tra.*

And by the rule in the register every *præcipe quod reddat* of plea of lands or tenements in *London* shall be directed unto the mayor and sheriffs jointly: but every other writ shall be directed unto the sheriffs only.

V. 18 E. 3. 8.
4 E. 6. 59.

And now it is a common opinion, That if a man **F** hath title to have a *Formedon* of lands or tenements in *London*, or any other action real, as a writ of *entry sur disseisin*, or other writ whatsoever of lands or tenements, he ought to sue this *writ of right patent* (b) directed unto the mayor and sheriffs of *London*, that they shall do right, &c. and that the demandant, upon this writ, shall make his protestation to sue it in the nature of what writ he will, as a man shall do upon a writ of *Droit Close* sued in antient demesne. But it seemeth the law shall not be so; for this writ is a *writ of right patent*, which is directed unto the mayor and sheriffs as other writs directed unto another city or borough are. And I have not heard that a man shall make protestation to sue such writ patent in the nature of what writ he will. But the city of *London* by their custom have power to hold pleas of lands within the city by other the king's writs as well as by *writ of right patent*, and that appeareth by the register.

7 H. 6. 32. ac.
37 H. 6. 27.
But *Plow.* 124.
Staunford, contrary.

(c) And it appeareth, that *London* is not antient de- **G** mesne; for then the writ of right, which shall be directed unto the mayor and sheriffs, should be close, and not patent. And it appeareth by the register, in the title of *juris utrum*, that a *juris utrum* was sued of tenements in

trat. 229. But it is otherwise, if a resummons be sued out of a court which has consuance on a foreign plea; *per Cur.* 14 H. 4. 25. See *per Norton and Hull*, a foreign issue joined in debt brought in court baron or other court, which may hold plea thereof, or in a suit by bill by a copyholder; it shall not be tried here (in *Westminster Hall*) contra of a writ of right brought in the court of the Lord. 1 H. 5. 12. 2r. 264.

(b) See a *Formedon* of lands in *London*. 43 Ed. 3. 21. So a writ of right in the hullings there, and protestation made in nature of a *Formedon*.

18 Ed. 3. 8. See also 3 H. 4. 12. 19. A foreign plea pleaded in a *Formedon* in *London* shall be removed to be tried (here) and after trial remanded to be adjudged (there). 14 H. 4. 25.

N. B. 18 Ed. 3. 8. The writ of right was sued in nature of a *Formedon* in *Defender* in *London*. See 4 *Inst.* 147. And no writ lies of lands in *London*, but in *London* only. *Dyer* 317.

(c) Note; In 7 H. 6. 32. it is certified, that *London* is not antient demesne.

London, returnable before the justices of the common pleas.

And also it appeareth in the register, in the title of writs of waste, in the end of the title, that a writ of *partic' facienda* was directed unto the mayor and sheriffs of London, to make partition of tenements in London; and also there followeth a writ of *estrepement*, sued and directed unto the sheriffs of London, upon a writ of (a) *juris utrum* depending before the justices of the common pleas, of tenements in London.

[7]

A And it appeareth in the register of a writ of *justicies* of of dower sued in London for lands in London was directed unto the mayor and sheriffs of the city, and a special writ for the heir in tail for lands in London directed unto the mayor and sheriffs there, upon a (b) devise made of the lands unto his ancestors in tail, &c. And the like writ for him in the remainder in tail, and also for him in the reversion. And the like writs upon devises made in other cities and boroughs by some persons to others, &c. And these writs are in the register after the writ of *formedon* in the remainder. Fol. 244.

And by these writs it appeareth, that a writ of *right patent*, which is directed unto the mayor and sheriffs of London, is not such a writ as a man shall declare thereupon in the nature of what writ he will, &c. as it shall be upon a writ of *droit close* sued in antient demesne; but that it behoveth to sue in London his writ in the nature of such writ as his case requireth, &c. But *quere veritatem* of that which was used in antient times in London.

(a) See a *Juris Utrum* of tenements in London challenged; for that their franchise is, not to implead or be impleaded without their city walls. *M.* 16 Ed. 3.

(b) See the first charter of Ed. 3. to London; the citizens of London being freemen, may devise their lands there in mortmain; and this seems to be an antient custom there. See *Cro. Car.* 48 and 57. And by the custom of London he who holds lands there

jointly with others, may devise that which belongs to him without any other severance. See 49 Ed. 3. London. And by the custom there, all the lands and tenements, rents and services, within the said city and suburbs are deviseable. So that the freemen and women of the said city may by the said usage devise them to whom and for what estate they will. See *Calthorpe's Cases* 103, 104. *W. B.*

Escheat.

And it appeareth in the register, that the king shall have B
 a writ of escheat returnable into the king's bench for
 lands in *London* escheated unto the king; and by the same
 reason another man shall have a writ of other nature,
 there, returned in the common pleas. *Quære*; For the
 king hath a prerogative in this matter before others, to
 sue in what court he will; but he cannot alter or change
 the nature of the writ, otherwise than the law giveth the
 the same to him; (c) and therefore *quære* of this matter.

Assise of fresh
force.

There is also another suit which lieth in a city or bo- C
 rough for lands or tenements, by usage and custom of the
 city, and that is by bill without any writ out of the chan-
 cery; and the same is called a bill of *fresh force*, or an
 assise of *fresh force*, and lieth only where a man is disseised
 of his lands and tenements in any city or borough, or de-
 forced of any lands or tenements after the death of his
 ancestor, or after the death of his tenant for life, or in
 tail, or in dower, or the like; now within forty days
 after the title accrued unto him, he may sue this bill of
fresh force, and shall make protestation to sue in the nature
 of what writ he will, as assise *de Mortdauncester*, or assise
 of *novel disseisin*, or *intrusion*, or of *formedon*, or in the na-
 ture of any other writ, as his case doth require: but after
 the forty days past after the title accrued unto him, he
 ought to sue a writ out of the chancery, directed to the
 mayor and sheriffs of *London*, as the case lieth.

And also it appeareth by the antient treatise of *Natura* D
Brevium, that if a foreigner sue an assise, or other *præcipe*
quod reddat of lands in *London* in the common pleas, &c.
 that the mayor and sheriffs, &c. (a) may demand conu-
 sance, &c. And therefore it seemeth, if they do not de-
 mand conuance of the plea, but suffer the recovery to
 pass in the common pleas before the justices, that then the
 recovery is good in the common pleas for the lands in
London. And when the mayors and bailiffs shall demand
 conuance of pleas, and when not, and when they have

(c) Here the words *and others* are not conuance in pleas (or suits) real,
 added to the original. but only in pleas personal. *M.* 16

(a) See *per Pult.* That they have *Ed.* 3.

surceased their times, appeareth in the title *conusance*, in the abridgements, more at large; and therefore see there.

Writ of Right of Dower.

E THE writ of right of dower is patent, and shall be directed unto the heir, to sue in the court of the heir, as it appeareth by *Britton*. And where the writ is directed unto the heir of the husband, and the same heir is seised of the land whereof the wife demandeth dower, then if he will not assign dower unto the feme, the feme who is demandant may remove the same by a *tolt* into the county, and also may remove the same out of the county into the common pleas by a *pone*, &c. without shewing of any cause in the writ, as the demandant shall do in a writ of right patent. But the tenant in a writ of right patent shall not remove the plea out of the county into the common pleas, without shewing of cause in the *pone*. And the tenant in a writ of right patent, or in a writ of right of dower, may remove the plea into the common pleas by a *recordare* out of the court of the lord, upon cause shewed in the writ. And what causes are sufficient and good to remove the plea out of the lord's court, or out of the county, and what not, does appear in the register; and therefore see the causes there. But the demandant cannot remove the plea out of the court of the heir by a *pone*, because he ought first to remove it by a *tolt* into the county, and from the county he may remove it into the common pleas by a *pone* without shewing of cause in the writ, as before is said.

Tolt, ant. 3. F. G.

Ant. 4 B.

And in a writ of right patent the plea may be removed at the tenant's suit by a *recordare* out of the lord's court into the common pleas, before the justices there: and by the same reason it seemeth that it may be removed at the suit of the tenant, in a writ of right of dower, out of the heir's court into the common pleas before the justices there, by *recordare*, for good cause. But *quære*.

F And if the husband do enfeof a stranger of all his lands, and dieth, and his heir hath nothing by descent; now if the feme be to sue forth a writ of right of dower, it seemeth she shall sue her writ of right of dower directed

unto the same feoffee, &c. for after the endowment the feoffee shall be her lord, and she shall hold this dower of him by fealty. But before the statute *de quia emptores terrarum*, if the husband enfeoff a stranger of parcel of his lands, &c. to hold of him, then if the feme be to sue a writ of right of dower against the feoffee, the writ shall be sued in the heir's court, and the writ shall be directed unto the heir, for the seignory that remaineth in him.

And so if the husband at this day giveth parcel of his manor in tail to hold of him, and dieth, the feme shall sue her writ of right of dower in the court of the heir of her husband against the donee in tail, and the writ shall be directed unto the heir: but if the husband make a gift in tail of all the lands that he hath, and dieth, and the feme is to sue a writ of right of dower of that land; then the husband's heir cannot have any court, because he hath but a seignory in gross; and therefore it stands with reason that she should have her writ of right of dower against the donee in tail directed unto the sheriff, returnable in the common pleas, and she shall have this clause in the writ; *because B. the chief lord of the fee, hath thereupon remitted to us his court.* A

And so if the husband make a lease of all his lands unto a stranger for life, and dieth, and the feme is to bring a writ of right of dower against the lessee for life; then it seemeth reasonable that the feme have her writ of right of dower against the lessee for life in the common pleas, because that he in the reversion hath not any court. B

And although that this clause, *viz. because B. the chief lord, &c.* be put in the writ, if the lord have not any court to hold, because it is a seignory in gross, and not any demesne land to hold a court, &c. then, although the lord did never remit his court, and that there is not any matter apparent or remaining in the chancery to prove the lord's will and assent to remit his court, yet the writ returned into the common pleas before the justices there, is good; and they shall proceed thereupon, if the lord hath not any court to hold plea for this matter. And it seemeth that the lord shall not have his action against the demandant for suing the writ in the common pleas, if he have no court to hold plea thereupon, and to do right unto the party. But if the lord hath a court to hold plea,

plea, then he may have a prohibition to the justices of the common pleas, that they do not proceed upon the plea, otherwise not. *Quære* of this matter.

C And this *writ of right of dower* lieth where a feme is endowed of parcel of her dower; and she would demand the residue against the same tenant, and in the same town, then she ought to shew this *writ of right of dower*; for the words of the other writ will not serve, *viz. unde nihil habet*, because that she hath received part of her dower; and therefore of necessity it behoveth her to sue this *writ of right of dower* to recover the residue; and the writ shall be directed unto the heir, or unto his guardian, if he be in ward, as a writ of right patent shall be, &c.

D And if a feme lose her land which she holdeth in dower by default in a *præcipe quod reddat*; yet according to (a) the opinion of some men, she shall have a *writ of right of dower*. But it seemeth by the equity of the statute of *West. 2. cap. 4.* that if a feme lose by default the land whereof she hath had dower, that by that statute she shall have a *quod ei deforceat* to recover the land; and before that statute she had no remedy for to recover the land, but only an action of *disceit*, if she were not summoned in this *writ of right of dower*.

E And if a feme hath a dower, and lose the same by assise or action tried, it seemeth she hath not any remedy but only by attain; for it seemeth that she shall not have remedy to recover by a *writ of right of dower*, because she had the land once assigned unto her in dower, and she was in possession of the same, so that the title was executed, and she ought to sue an action of her own possession, if she be afterwards deforced. *Tamen quære.*

F And after the plea removed unto the common pleas, the process is then *grand cape* and *petit cape*. And in the heir's court the manner is to make a precept in the nature of summons, and of *grand cape* and *petit cape*, and the writ directed unto the heir is such:

G *The king to A. greeting: We command you, that without delay you do full right to B. who was the wife of C. of a third*

(a) See accordant herewith *Jon. case the writ mentions their estates. Rep. 381. 1 Cro. 445.* And in such *W. B.*

unto the same feoffee, &c. for after the endowment the feoffee shall be her lord, and she shall hold this dower of him by fealty. But before the statute *de quia emptores terrarum*, if the husband enfeoff a stranger of parcel of his lands, &c. to hold of him, then if the feme be to sue a writ of right of dower against the feoffee, the writ shall be sued in the heir's court, and the writ shall be directed unto the heir, for the seignory that remaineth in him.

And so if the husband at this day giveth parcel of his manor in tail to hold of him, and dieth, the feme shall sue her writ of right of dower in the court of the heir of her husband against the donee in tail, and the writ shall be directed unto the heir: but if the husband make a gift in tail of all the lands that he hath, and dieth, and the feme is to sue a writ of right of dower of that land; then the husband's heir cannot have any court, because he hath but a seignory in gross; and therefore it stands with reason that she should have her writ of right of dower against the donee in tail directed unto the sheriff, returnable in the common pleas, and she shall have this clause in the writ; *because B. the chief lord of the fee, hath thereupon remitted to us his court.* A

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And although that this clause, *viz. because B. the chief lord, &c.* be put in the writ, if the lord have not any court to hold, because it is a seignory in gross, and not any demesne land to hold a court, &c. then, although the lord did never remit his court, and that there is not any matter apparent or remaining in the chancery to prove the lord's will and assent to remit his court, yet the writ returned into the common pleas before the justices there, is good; and they shall proceed thereupon, if the lord hath not any court to hold plea for this matter. And it seemeth that the lord shall not have his action against the demandant for suing the writ in the common pleas, if he have no court to hold plea thereupon, and to do right unto the party. But if the lord hath a court to hold plea,

plea, then he may have a prohibition to the justices of the common pleas, that they do not proceed upon the plea, otherwise not. *Quære* of this matter.

C And this *writ of right of dower* lieth where a feme is endowed of parcel of her dower; and she would demand the residue against the same tenant, and in the same town, then she ought to shew this *writ of right of dower*; for the words of the other writ will not serve, *viz. unde nihil habet*, because that she hath received part of her dower; and therefore of necessity it behoveth her to sue this *writ of right of dower* to recover the residue; and the writ shall be directed unto the heir, or unto his guardian, if he be in ward, as a writ of right patent shall be, &c.

D And if a feme lose her land which she holdeth in dower by default in a *præcipe quod reddat*; yet according to (a) the opinion of some men, she shall have a *writ of right of dower*. But it seemeth by the equity of the statute of *West. 2. cap. 4.* that if a feme lose by default the land whereof she hath had dower, that by that statute she shall have a *quod ei deforceat* to recover the land; and before that statute she had no remedy for to recover the land, but only an action of *disceit*, if she were not summoned in this *writ of right of dower*.

E And if a feme hath a dower, and lose the same by assise or action tried, it seemeth she hath not any remedy but only by attain; for it seemeth that she shall not have remedy to recover by a *writ of right of dower*, because she had the land once assigned unto her in dower, and she was in possession of the same, so that the title was executed, and she ought to sue an action of her own possession, if she be afterwards deforced. *Tamen quære.*

F And after the plea removed unto the common pleas, the process is then *grand cape* and *petit cape*. And in the heir's court the manner is to make a precept in the nature of summons, and of *grand cape* and *petit cape*, and the writ directed unto the heir is such:

G The king to A. greeting: *We command you, that without delay you do full right to B. who was the wife of C. of a third*

(a) See accordant herewith *Jon.* case the writ mentions their estates. *Rep.* 381. 1 *Cro.* 445. And in such *W. B.*

part of ten acres of land with the appurtenances in W. which she claims to hold of you in dower by the free service of a third part of one penny per annum for all service, whereof C. unjustly deforceth her, &c.

And also a feme may have a writ of right of dower of H the moiety, according to the usage of gavelkind, where she hath received part, and is deforced of part. And it also appeareth by the register, that the feme shall have a writ I of right of dower directed unto the heir himself, where he himself deforceth her of the profits of an office; and the writ is such:

The king to A. greeting: We command you that you do full K right to A. and R. his wife, of the third part (b) of the issues arising from the keeping of the gaol of Westminster-Abbey, and of the third part of three roods of land, one rood of meadow, and of the rent of so many loaves, and of so many flaggons or of so many firkins of ale by the day, or by the week, or by the year, with the appurtenances in the city of Westminster, which they claim to belong to their free tenement, which they hold of you for the dower of the said R. in the said city, and to hold of you by the free service of finding for you one third part of a keeper for the keeping of the gaol aforesaid, and of the gate of the said abbey, for all service, whereof you yourself unjustly deforce them, &c.

[9]
Vide infra l.
accord'.

And by this it appeareth, that a feme shall have a writ A of right of dower of that thing which is appendant or appurtenant unto the land which she holdeth in dower, &c. if she be deforced thereof.

(b) See 15 Ed. 3. F. Dower 81. Dower demanded of the profits arising from a fair. See 11 Ed. 3. F. Dower 85. Dower demanded of the moiety of a stallage arising from a fair, and held good, without saying a moiety of the profits of the stallage; for the stallage is the profits. See the Book of Entries 234. Of the third part of the issues and profits of a certain market every Tuesday, and of a fair every year on the feast of, &c. 12 Ed. 3. F. Dower 90. A demand of the

third part of the profits of the office of a bailiff, parker, &c. without demanding a third part of the office itself; which cannot be, because the office is intire. *Quære* of the office of tentury *ibid.* See 45 Ed. 3. F. Dower 50. where a feme was endowed of the third part of the profits of a mill, and had (thereby) the freehold of the third part of the mill vested in her. See 21 Ed. 3. 57. Dower of the third part of the office of the marshalshalea.

Writ of Right de rationabili Parte.

B **A** Writ of right *de rationabili parte* always lieth be-
twixt privies in blood, as betwixt brothers in *gavel-*
kind, or betwixt sisters and other coparceners, as nephews
and nieces, and lieth for lands in fee-simple: as if the
ancestor lease his lands for term of life, and dieth, and hath
issue two daughters, and afterwards the tenant for life
dieth, and one daughter entereth into the whole land, and
deforceth her sister of the land; her sister shall have this
writ of right *de rationabili parte*: and so if the ancestor
was disseised of lands, and dieth, and one sister
entreth into the land, and deforceth her sister thereof; the
sister who is deforced shall have this writ against her other
sister. And so two or three may sue this writ against the
C fourth sister, or the aunt, and the niece may sue this writ
against that sister which deforceth her of her part, &c.
D And this writ lieth as well upon a dying seised of the an-
E cestor, if one sister enter upon all, and deforce the other
sisters, as where the ancestor doth not die seised: and the
F writ is a *writ of right patent*, and shall be directed to the
lord of whom the lands are holden, as other *writs of right*
G *patent* shall be, and shall be removed by *tolt* and other
writs, as the common *writ of right* shall be. But grand
assise, nor battail, shall not be joined in this writ, for
the privy of the blood that is betwixt them. Neither
shall this writ be sued against a stranger, and if it be it
shall abate. And if the ancestor die seised, and one sister
entereth into all the land, and deforceth her sisters, the
others may sue this writ of right *de rationabili parte*, or a
writ of *nuper obiit*, at their election. And so it is for
lands in *gavelkind*; if one brother entreth into all the lands,
and deforceth his brethren, they may sue this writ of
right *de rationabili parte*, or a *nuper obiit*, if the ancestor
die seised: but if the ancestor doth not die seised, then
they ought to sue this writ *de recto rationabili parte*. But
against a stranger it behoveth to sue *assise de Mortdauncester*
upon the death of their ancestor, or other writ (as their
case

Nat. Brev. 119.
Post. 197.

Nat. Brev. 119.

Writ of Right de rationabili Parte.

case shall require) of the seisin of their ancestor. And the form of the writ of right *de rationabili parte* is such :

*The king to A. B. greeting : We command you, that with- H
out delay you do full right to W. F. of ten acres of land with
the appurtenances in B. which she claims to be her reasonable
part, which belongs to her of the free tenement which was J.'s,
her father's, or mother's, uncle's or aunt's, or cousin's, in the
same vill, and to hold of you by the free service of the third part
or the fourth part of one penny per annum for all service,
whereof B. and S. unjustly deforce her.*

And by the register, in this writ, a man may see what rent and services all the land which is partible betwixt the the sisters shall yield and pay unto the chief lord, and accordingly put every one of the heirs to her part. So if there be one damandant and two deforceants, then thus ; *Which she claims to hold of you by the free service of the third part of so much per annum.* And if there be two demandants and two deforceants, then thus : *Which she claims to hold of you by the free service of a moiety ; or, of two parts of so much per annum for all service.* And if the land be holden by 4d. per annum and fealty, and there are two demandants and two deforceants, then the writ may be : *Which she claims to hold of you by the free service of two pence per annum for all service, &c.*

* V. sup. A.
accord'.

And if there be two sisters, and after the death of the I
ancestor they enter and occupy in common as coparceners, and one of them deforce the other sister to occupy that which is * appendant or appurtenant to the tenement which they have in coparcenary : then she who is deforced shall have a writ of right *de rationabili parte* against her sister, of that which is so appendant or appurtenant, and the writ for that shall be such : *Which she claims to belong to her freehold which she holds of you in the same vill, and ought to hold of you by the free service of so much for all service, K
which W. &c.* And in this writ he shall make his demand of a certain portion of land, as to so much as his plea doth amount unto, to hold in severalty ; as if the ancestor die seised of twenty acres, and hath two daughters, and one entreth into the whole, and deforceth her sister ; the other sister shall demand by her writ ten acres of the twenty acres, because that such is her part ; and by this writ

L writ if she recover, she shall have judgment to recover Judgment.
ten acres, to hold in severalty, as her part doth amount
unto (a).

M And this writ of right *de rationabili parte* ought to be
brought against all the coparceners that hold the land, &c.
and by all those that are deforced of the land, as it ap-

N peareth by *Britton*: And voucher and view do not lie in
this writ, because of the privity of blood; but in a
rationabili parte the view was granted *H. 15 H. 5.*
because that the ancestor did not die seised, &c. And

O non-tenure is no plea in this writ by *Britton*, &c. And
the process in this writ, after it is removed into the
common pleas, is *summons*, *grand cape* and *petit cape*;
and in the lord's court the manner is to make process
in the nature of *grand cape* and *petit cape*, &c.

P And the heir of one coparcener may sue this writ of
right *de rationabili parte* of the seisin of the common
ancestor, which was of the seisin of his ancestor in the
time of King *R. 1.* or *H. 3.* or of the seisin in the
time of King *John*, or other kings after that time, if he
can prove it. As a man shall have a writ of right

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A patent of the (b) seisin of his ancestors in such times,
&c. But if one coparcener claim the land by a feoff-
ment made unto her by her ancestor in fee; now if
the other coparcener deforce her of the lands, she may
have a writ of right patent against her sister for the
land, and shall join the mise by grand assise, or by bat-
tail, because she doth not there claim the land as heir
to her ancestor, as it seemeth; *Tamen quare*.

Com. 306. no
battail lieth be-
twixt them.

B And if a man hath issue two daughters, and dieth
seised of lands in tail, and one daughter entreth into

(a) Vid. accordant 12 Ed. 3. *Judg-
ment* 162. 7 Aff. 10. 7 Ed. 3. 49.
&c. cited in the margin of *Co. Lit.*
167. b. That if two coparceners be,
and one disseise the other, and the
disseisee recovers in assise, &c. she
shall have judgment to *bold* her moiety
in *severalty*; so if one coparcener re-
covers against the other in a *nuper*
obit, or *rationabili parte*, the judgment

shall be, that the demandant shall re-
cover and *bold* in *severalty*. 3 Ed. 3.
48. 4 H. 7. 10. 30 Ed. 1. *Nu-
per obit* 18. 21 R. 2. *Nuper obit*
22.

(b) And in that case if the de-
mandant be within age, the parol
shall demur; *contra*, if there be no
mesne descent of the right. 7 H. 4.
20.

the whole, and deforceth her sister; there the sister may have a *formedon* against the other sister, and not a *nuper obiit*, nor this writ of right *de rationabili parte*; for this writ lieth properly for the lands in fee-simple.

Vide Mag. Char.
cap. 10.

Writ of Ne injuste vexes.

C. 4. Part II.
Bewil's Case;
infra G.

WRIT of *ne injuste vexes* lieth in case where **C** lord and tenant are, and the tenant hath holden of the lord and his ancestors by fealty and twenty shillings rent yearly, and of late time the lord hath gotten (a) seisin of greater and more rent of the tenant, by payment of the tenant of his own agreement without coercion of distress: now if the lord will distrain the tenant for this surplussage of rent, the tenant cannot avoid the lord in an avowry, for the seisin which the lord hath had by the payment of the tenant of this rent of his own agreement. But the tenant may sue this writ of *ne injuste vexes* directed unto the lord; which writ is in itself a prohibition unto the lord, that he do not distrain his tenant to do other services than of right he ought to do. And this writ in its nature is a writ of right, and shall be patent; and this clause, *And unless you will do this, the sheriff, &c. shall be put into the writ.* And the process in this writ is, *prohibition, attachment and distress* against the lord, commanding him that he shall not distrain, &c. And this writ is founded **E** upon the statute of *Magna Charta*, cap. 10. which willeth, *That no man be distrained to do greater service for a knight's fee, nor for any other freehold, than is therefore due.* And the form of the writ is such:

(a) But if the lord recover more on an action tried, the tenant shall not have a *ne injuste vexes*; per *Knivet: Quare*. 39 Ed. 3. 18. and see accordant 38 Ed. 3. F. Droit 32. And by *Green*, the tenant shall have a *ne*

injuste vexes, although the lord recovers the rent by assise, which he had released, but the deed thereof not produced in evidence; or where the assise was taken on the seisin and disseisin. 7 H. 5. 7. a.

(b) The

F (b) The king to A. greeting: We command you, that you unjustly vex not, or permit to be vexed, B. concerning his free tenement which he holds of you in J. nor therefore require or permit to be required of him customs or services which he oweth not, nor is used to do for the same; and unless you will do this, the sheriff of Lincoln shall cause the same to be done, that we may hear no more clamour thereupon for want of right.

And this writ is always ancestrel, viz. where the tenant and his ancestors have holden of the lord and his ancestors by fealty and twenty shillings rent, or other rent and service; and of later time the lord hath incroached divers others services or rents, by payment of the tenant, or doing of other services which he ought not to do unto the lord; then the tenant may sue this writ: for by incroachment of rent by the lord by payment of the tenant, the tenant shall not avoid the same in an avowry by the lord for that rent which is so incroached. But if the lord do incroach other services which the tenant of right ought not to do unto him, as homage or escuage; then the tenant may avoid this incroachment in avowry by the lord for these services, because the tenant may traverse the manner of the tenure in that case; as to say, that he holdeth of the lord by fealty and twenty shillings rent only, without that he holdeth by homage, fealty and rent, in the manner and form as the avowry is made: or the tenant may sue this writ of *ne injuste vexes* in that case if he will. And if the lord do distrain to do other services after the prohibition delivered unto him, or to pay more rent than of right he ought to pay, then the tenant shall have an attachment against the lord returnable in the common pleas, or in the king's bench. And when the lord cometh upon the attachment, then the tenant shall count against him in this manner.

But otherwise in assise of rent, of in a writ of rescous or cessavit for the tenure is traversable in these writs.
12 Ed. 4. 7.
22 Aff. 68.
Thorpe.
V. 26 H. 8. 6.
7 Ed. 4. 28.
16 Ed. 4. 11.
20 Ed. 4. 17.
10 H. 7. 11.
26 H. 8. 6.
Com. 45. &
94.

B. sheweth unto you, that whereas he holdeth of the aforesaid A. &c. as of his manor of C. twenty acres of land with the appurtenances in W. by homage, feal-

The count.

(b) This writ lies not against the lord where a recovery in an action is had by him. 38 Ed. 3. F. Droit 32.

ty;

The defendant
actor,

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ty, and by the service of the twentieth part of a knight's fee, and by the services to render to the said *A.* half a pound of pepper yearly at the feast of *All-Saints*, for all manner of services: yet the aforesaid *A.* over the services aforesaid, vexeth the said *B.* and suffereth him to be vexed, and of him demandeth and distraineth, and suffereth him to be distrained for nine shillings *per annum* of rent, for which he is damnified unto his damage of twenty pounds. And so note, that he shall declare of damages in this writ; and then upon this count, the lord who is defendant shall make his defence, and shall defend the wrong and force, &c. and shall count against the plaintiff, and shall say, that he doth not tortiously demand the said rent of nine shillings over the other services, &c. for he shall say, that the said *B.* holdeth the said twenty acres of land, &c. of him by the said rent and services, &c. and that he the said *A.* was seised as well of the said rents of nine shillings, as of all the other services aforesaid, by the hands of the aforesaid *B.* as by the hand of his very tenant for the said twenty acres of lands with the appurtenances, as of fee and of right in time of peace, viz. in the time of King *Edward*, late King of *England*, &c. in taking of the esplees, viz. rents, &c. And that such is his right, he is ready to make good by his body, &c.

And thereupon he who is plaintiff in the *ne injuste vexes* shall defend this count, and thereof shall put himself upon the grand assise, and so the mise shall be joined betwixt them in this writ, which is at first but a prohibition, &c. And judgment final shall be given upon this writ after the mise joined, if it pass against any of the parties; or if any of them be nonsuit, or make default after the mise joined. And see the form of the count and of the defence in this writ, in the book of *Entries of Pleas*, f. 90. on the first page.

And it appeareth *M. 18 Ed. 2.* that the (a) feoffee shall not avoid seisin of rent had by incroachment of his

(a) See accordant 33 *Ed. 3.* F. therefore on special matter shewn he *Avowry* 255. or rather 225. And may traverse, That he takes by the feoff-

his feoffor, nor shall he have a writ of *ne injuste vexes*; nor a man shall not have a writ of *ne injuste vexes* against the grantee of the feignior, as appeareth, p. 10. E. 3.

14 H. 4. 5 ac.
by Thirning,
and after 163.
See 12 H. 4.
cont. per Hankf.

D And *Trin. 20 Ed. 3.* it appeareth that tenant in tail shall not have *ne injuste vexes*, &c. but he shall plead *, and shew the matter, and shall not be estopped by the payment and seisin had by the hands of his ancestors; but by a seisin had by his own hands he shall be bound during his time in avowry, as it seemeth. But after E the mise joined in a writ of *ne injuste vexes* sued, if the parties imparl until another term and day, and after at this term at the day the lord, who is the defendant in the *ne injuste vexes*, make default, now what process shall be awarded thereupon, or if judgment shall be given upon this default without any process, *quare*. And so if the plaintiff at another term after the mise joined, and day given, &c. make default, it seemeth he shall be nonsuit, &c. See fol. 5. D.

* See 20 Ed. 3.
F. Avowry 131.

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See 4 Inst. 269,
270.

F WRIT of *droit close* is a writ which is directed unto the lord of ancient demesne, which lieth for those tenants within ancient demesne, who held their lands and tenements by charter in fee-simple, or in fee-tail, or for life, or in dower; if any of them be ousted of his lands or tenements, or disseised, &c. he or his heir may sue this writ of *droit close* directed unto the lord of ancient demesne, commanding him to do right, &c. in his court; and the form of the writ is such:

G Henry by the grace, &c. (b) to his bailiffs of J. greeting: We command you, that without delay, and according

to

feoffment, and the tenant by whose hands the seisin was, shall not avoid this on the avowry. 18 Ed. 3. F. Avowry 217.

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(b) Note; Though the writ is directed to the bailiffs, yet the suitors are the judges. Mich. 17, 18 Eliz. Rot. 1381. See Benl. N. 254.

D

Note

to the custom of our manor of J. you do full right to A. of one messuage with the appurtenances in J. whereof B. unjustly deforceth him, that we may hear no more clamour thereupon for want of right. *Witness, &c.* And another writ thus:

The king to his bailiffs of the castle of Bamburgh, greeting: *We command, &c. that, &c. according to the custom of the manor of the castle of Bamburgh, you do full right of two parts of the fishery of the water of J. in Bamburgh, whereof B. deforceth him, &c.* And the order of putting H the parcels of houses, lands, meadows and pasture, &c. shall be observed and used, as shall be done in a writ of right patent. And this writ may be sued of com- I mon of pasture, and for stopping of a way, and such like. And the writ for the common is such:

The king, &c. *We command you that you do full right, K &c. of common of pasture in T. which belongeth to one messuage and ten acres of land, which he holds in the same vill according to the custom of the manor aforesaid, whereof B. C. and D. unjustly deforce him. And for stopping of a way the writ is such:*

The king to the bailiffs of the bishop of Litchfield and L Coventry of the manor of C. greeting: R. hath complained to us, that W. unjustly and without judgment hath obstructed a certain way in D. which is within the precinct of the same manor, to the nuisance of one messuage which the said R. holds according to the custom of the manor aforesaid in the same vill: and therefore we command you, that having called before you the parties aforesaid, and having heard their reasons, from hence thereupon you (a) cause to be done to the said R. due and speedy fullness of justice in the premisses, as hath been used to be done according to the custom of the manor aforesaid.

Note also; Although the precept be *quod venire faciat* 12, &c. yet on the protestation to sue in form (or nature) of an assise, the return of 12 is good, and so it seems of 24. *Hill. 19 Eliz. 3. Hayter's Case, & 44, Aubrahall's Case.*

(a) But Note; Some actions which are suable there (*i. e.* in the manor court) only, are suable by way of plaint, as replevin, account against a guardian in socage; and so it seems of a writ of *mesne*. See 21 *Ed. 3. 10.*

And

M And note, that the demesne lands of a manor, and the manor itself, which is called ancient demesne, is pleadable at the common law; as a man ought to sue his action for the manor, and for the lands, which are parcel of the manor, at the common law and in the common pleas. But if a man will sue for the lands which are holden of the manor, which are in the hands of a (b) free tenant who holdeth of the manor, for these lands he ought to sue this writ of *droit close*, directed unto the lord of the manor, and there he shall make his protestation to sue in that court the same writ, in the nature of what writ he will declare. And the form of entry when such writ is brought in court, is such :

N At this court cometh R. N. by Nicholas B. his attorney (by the letters patent of the said R.) and hath delivered to the aforesaid bailiffs a certain close writ of the lord the now king, directed to the same bailiffs, to be executed in form of law according to the custom of the manor aforesaid, the tenor whereof followeth in these words :

Henry, &c. to the bailiffs of J. of S. greeting: We command you, that justly and without delay, and according to the custom of the manor of G. of S. you do full right to Robert N. of two messuages, &c. in W. and H. of which P. and C. unjustly desorce him, that we may hear no more clamour thereupon for want of right, &c. And upon this the aforesaid Robert N. finds pledges of prosecuting his writ aforesaid, to wit, T. and W. and protesteth to prosecute that writ in the same court in form and nature of a writ of assise of novel disseisin at the common law, according to the custom of the manor aforesaid, saying, that the aforesaid P. and C. unjustly and without judgment have disseised him of his free tenement in W. and H. to wit, of the tenements aforesaid with the appurtenances, after the first, &c. And he thereupon prayeth process to be made according

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(b) And Note; Lands that are recovered in a court of ancient demesne, it is a disseisin. 30 Ed. 3. that is ancient demesne. See 11 H. Aff. 3. 4 H. 6. 79. 4. 86. per Cur'. Yet if frank-fee be

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to the aforesaid custom of the same manor, &c. Therefore according to the custom of the same manor T. H. the under-bailiff of the manor and minister of this court, is commanded, that he cause those tenements to be reseised of the chattels which were taken therein, and the same tenements with the appurtenances to be in peace until at the next court to be held before the aforesaid bailiffs and suitors of the same court, to wit, on Thursday next coming, here, to wit, at S. and in the mean time that he cause twelve free and lawful men of the neighbourhood of W. and H. aforesaid, within the precinct of the manor aforesaid, to view the tenements aforesaid, and to cause their names to be put in the writ, and that he summon them by good summoners, that they be then here, to wit, at S. ready to make cognizance thereupon; and that he put by gages and safe pledges, the aforesaid P. T. his bailiff, if he shall not be found that he be then there at S. to hear that cognizance, &c. And that he then have there the names of the pledges, the summoners, and the said precept to him thereupon directed. And the same day is given to the aforesaid R. N. &c.

See all this form to make protestation in the book of Entries of Pleas, *Fol. 115.* And then at the day of the precept and process returned, the defendant ought to appear and plead in bar, or unto the writ, or other matter, in such form as shall be in an assise at the common law. And if the protestation be made in the nature of another writ, then the precept shall be according unto the nature of the process which is given in such writ; and the tenant when he cometh in shall plead as he shall do in such writ sued against him at the common law, for the nature of the protestation doth alter and change the manner of pleading for the tenant.

Post 18.

And if false judgment be given in this writ, the party tenant or demandant may sue a writ of false judgment thereupon. A

But he who holdeth land in ancient demesne by copy of court-roll, at the will of the lord, who is called tenant by base tenure, if he be ousted of his lands or tenements there in ancient demesne, he shall not have this B

this writ of *droit close*, but he ought to (a) sue by bill in the court of the lord of the manor, and shall make protestation to sue there in the nature of what writ he will. But if false judgment be given against him in that court, he shall not have a writ of false judgment thereupon at the common law, nor other remedy; but to sue unto the lord by way of petition, as it appeareth in 14 H. 4. For those who hold their lands in base tenure in ancient demesne, or by the rod, hold them in villenage, and they shall not have such writ of *droit close*, nor a writ of (b) false judgment, &c. See the statute of 1 R. 2. cap. 6. of that matter.

Lit. 6. acc.
14 H. 4. 34.
7 Ed. 4. 19.

C And this term, which is now at this day called copy-tenants, or copy-holders, or tenants by copy, is but a new found term, for of ancient times they were called tenants in villenage, or of base tenure; and that appeareth by the ancient tenures, that those who held by the rod, or in base tenure, or by copy of court-roll, were then called and named tenants that held in the villenage: for tenants by copy of court-roll are not specified, nor named by such name; but yet at that time there were such tenants, but then they were called tenants in villenage, or of base tenure.

Note, copyhold tenants.

D And when the writ of *droit close* cometh unto the lord, or unto his bailiffs, the lord ought for to hold his court, and to proceed thereupon according to law, &c. And if the lord will not hold his court, then the demandant may sue a writ out of the chancery directed unto the lord, commanding him to hold his court, &c. And if he will not hold it, then the demandant may sue an attachment against the lord directed unto the sheriff, returnable in the common pleas or king's

(a) See 14 H. 4. 34. 1 H. 5. 12. Nat. Brev. 16.

(b) And Note; 14 H. 4. 34. "it was adjudged, That if one recover against tenant by the verge in ancient demesne by writ of right close, the tenant shall not have a writ of false judgment, nor assign this for

error; for then he should be restored to a freehold which he never lost, but always continued in the lord. But it seems the recovery is void, and may be avoided by plea. 1 H. 5. 12. And so it is, though they are lands at common law. 18 H. 6. 28.

bench, and thereupon the demandant shall recover his damages.

And if the writ of *droit close* be directed unto the bailiffs, &c. and they will not hold the court, then he may sue such a writ unto the bailiffs, commanding them to hold their court; and if they will not so do, he may sue an attachment against them directed unto the sheriff, returnable as aforesaid, &c.

(a) And if the lord himself oust his tenant of lands E which are holden of the manor by charter in fee, the tenant who is ousted shall have this writ of *droit close* directed unto the lord himself, if he will, &c. Or in this case he may have an assise, or other writ at the common law against the lord of those lands. But it appeareth by a rule in the register, that if the demandant be defeated of justice in the lord's court, that then the demandant may sue a writ directed unto the sheriff, commanding the sheriff that he go unto the court in ancient demesne, and that he take with him four discreet knights in their proper persons, to see that right be done unto the party demandant in this writ; and if the sheriff refuse so to do, he may have an *alias* and *pluries*, and attachment against the sheriff in the common pleas or king's bench. But it seemeth, that this writ which shall be so sued directed unto the sheriff, that he see right done to the demandant, is of little effect; for by virtue of this writ he cannot compel the lord to do right unto the demandant, as it seemeth; *tamen quære*: for if he cannot cause the lord to do right unto the demandant in a writ of *droit close*, then it shall be in vain to sue such writ directed unto the sheriff, to go unto the lord's court, and to see that

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(a) See 21 Ed. 3. 26. Assise brought by the tenant against the lord and another, and the other takes on him the tenancy, and the lord would have pleaded ancient demesne, and because he was named only as a disseisor, he could not. See 41 Ed. 3. 22. A *præcipe* brought by a tenant against the lord in ancient demesne,

and two others, and the lord disclaims, &c. And see there, there is the same election of the tenant, where he brings his action, or the lord disseises him.

Quære, If the tenant recovers against the lord at common law, if ever the lands can be ancient demesne again.

right be there done. And the demandant may sue such writ directed unto the bailiffs, or unto the lord himself, commanding them that they do him right, &c. and that they do not delay the matter, &c. And thereupon an *alias*, a *pluries*, and *attachment*, if need be.

A And if a plea be removed in the county, the demandant may sue such writ directed unto the sheriff, that he proceed in the plea, unto judgment, and to do right; and upon that he shall have an *alias*, a *pluries*, and *attachment*, against the sheriff, if he will not do accordingly.

B And note, that the demandant in a writ of *droit close* cannot (a) remove the plea out of the lord's court for no cause, &c. nor the tenant remove the plea out of the ancient demesne, if not for causes which prove the land to be frank-fee, and not ancient demesne; and the form of the writ of *recordare* to remove the plea out of ancient demesne is such :

C (b) *The king to the sheriff of Lincolnshire, greeting :
We command you, that having taken with you four discreet
and*

(a) See accordant, *per Cur'*, 34 H. 6. 35. *Sed contra*, 2 Ed. 3. 29. But *ibid.* 35. seems to agree. See also 3 H. 4. 14. Where he is but bailiff, he may maintain the plea, or if he be party, the parol shall be remanded; yet if the bailiff be cousin and heir to the plaintiff, it is good cause of removal; yet see 6 H. 4. 1. That he was bailiff of the robes to the plaintiff was held no cause of removal, *per Cur'*; and therefore remanded; and if the court does not do right, he is put to his writ of false judgment. 12 H. 4. 17. 13 H. 4. 14. Nor is it cause of removal, that the process there was misawarded. 9 H. 6. 25. Nor when the bailiff is demandant. 11 H. 6. 10. *Per Cur'*.

(b) Note; On a *recordare* from a court of ancient demesne, if the re-

cord be made up and removed, but the cause of removal appears to the court to be insufficient, the tenant shall not be essoined, 34 H. 6. 35. *per Cur'*; but if the cause be sufficient, the tenant may be essoined. 14 Ed. 3. *Essoin* 10. 19 Ed. 3. *Essoin* 23. 23 Ed. 3. *Essoin* 183. But some held the contrary. For if the cause be true, the writ shall abate, if not true, it shall be remanded. 8 Ed. 3. 7. And it was said, if the tenant be essoined on his writ of false judgment, [*Recordare*] and the demandant admits it, the whole matter in the lord's court is discontinued. 2 Ed. 3. 35. Yet see in the same folio an essoin allowed for him who brought the *recordare*, and a feme plaintiff was received in a *recordare*.

9 H. 6. 34.

and lawful knights of your county, you go in your proper person to the court B. of C. and in the full court you cause to be recorded the plaint, which is in the same court by our little writ of right, between, &c. of one messuage with the appurtenances in J. and have you that record before our justices, &c. and to the parties, &c. And have you there the names of the aforesaid four men, and this writ and the other writ, &c. Because the aforesaid A. in pleading in the court aforesaid, hath produced the charter of Lord Henry formerly king of England, our progenitor and great grandfather, by which our said great grandfather enfeoffed W. the father of the aforesaid A. (whose heir he is) of the messuage aforesaid, as it is said; wherefore the same A. says, that he neither can nor ought to answer without us: let execution of the writ be done, if the cause be true; and the aforesaid A. prays this, and otherwise not. There is another cause in the register, thus: Because he claims to hold the tenements aforesaid at the common law, &c. But

A writ of right close is brought, and pendent the writ the tenant accepts a fine *sur conuissance de droit come ceo que il ad*, &c. yet the land remains ancient demesne, as to that action, because he hath affirmed his plaint before the fine; and so it was holden, 12 H. 7. Rot. 103.

then in the common pleas, when the record is removed, he ought there to shew some special matter to prove the lands and tenements to be frank-fee, and not ancient demesne, otherwise the plea shall be sent back unto

If the tenant who brings a *recordare* makes default, the plea shall be remanded, and therefore in a writ of right against divers by several summons, if they join in a *recordare*, and the record is removed, and one of them is nonsuited, it extends to all. 2 Ed. 3. 29. 10 Ed. 3. 59. But this is doubted. 18 H. 6. 28. *vide Kel.* 115.

If the record be not fully sent, although at the day prefixed, the tenant makes default, or the demandant, this makes no matter, as it seems. But if the record be fully sent, if at the day the tenant makes default, the record shall be remanded, and if the demandant makes default, the writ of right shall abate. See

17 Ed. 3. 44. 27 Ed. 3. 77. 18 Ed. 3. 3.

If at the day no record be made, nor the original sent, although the demandant makes default, he shall not be nonsuited, but a grand distress shall go against the bailiff, to deliver the writ, and against the suitors, to make the record, but the non-appearance of the demandant shall be recorded. 27 Ed. 3. 77. If the record be made, but the original is not sent (or returned) if the demandant makes default, it shall be adjudged a nonsuit, if an original be necessary. 8 Ed. 3. 7. 10 Ed. 3. 59. *quod nota.* 17 Ed. 3. 44. 13 Ed. 3. 9. *quod vide.* 18 Ed. 3. 3.

the

the lord's court: but to shew a (a) fine levied in the king's court of the same land; or a recovery had in the king's court in a *præcipe quod reddat*, &c. is a good cause to prove the lands to be frank-fee; and if he claim the land by the feoffment and the king's charter, or by the feoffment of charter of the lord of the manor; or if he claim to hold them of the king, as of another manor of the honour, &c. and not to hold them of the same

40 Ed. 3. 4.
50 Ed. 3. 24.
34 H. 6. 35.
6 H. 4. 1.

(a) If a fine on render be levied of ancient demesne, it seems that the nature of the land is changed without any execution. 40 Ed. 3. 40. *per Thorp and Thirn*. So if a judgment rendered, &c. *Vide* 2 Ed. 4. 28. But 18 Ed. 2. *Ancient Demesne* 37. If a fine be levied *sur conusance de droit*, and release, hereby there is no transmutation of the possession, nor is the tenancy altered as to the lord, &c. (or any stranger to the fine.) 40 Ed. 3. 4. *per Candish*, but *Belkn. contra*. 18 Ed. 2. *Antient Demesne* 37. But as to the parties themselves, the tenancy is changed by way of estoppel, *per Wilby*; and so it was adjudged. For if such conuser brings an assise against the conusee, or *è converso*, no exception of ancient demesne lies. 21 Ed. 3. 25. And therefore if the lord be a party, by such fine the tenancy is changed, and also he shall never have a writ of disceit. 30 Ed. 3. 13. b. or 17. *per Green*. *Vide* 29 Ed. 3. 36. at the *distringas seſtatores*, the record was received by attorney made by the suitors by writ out of chancery.

And *Note*; Although the fine be levied by a disseisor, yet the disseisee, as it seems, ought to sue at common law, but when he has recovered the tenements, they shall be ancient demesne again, 3 Ed. 3. 33. and therefore if in such case judgment be

given in the court of ancient demesne, and the recoverer enters, in trespass brought against him for this entry, he cannot justify by force of the recovery there, for it was *coram non judice*. 7 H. 4. 3. accordant, where these particulars are also agreed, *viz.*

* 1st. If *A.* recovers against *B.* in a writ of right, in nature of an assise in ancient demesne, where in truth there is a fine levied of the same tenements, and the cattle of *B.* are thereupon taken in execution, he shall recover in a replevin, because it was *coram non judice*; nay, although the manor was in the king's hands at the time of the fine levied.

But, 2^{dly}, It is there admitted, that if part of the tenements so recovered be ancient demesne, of which no fine was levied, in such case the bailiff may justify the taking of the defendant's cattle in execution in any place within the manor, although that such place was not ancient demesne. 7 H. 4. 28, 29. Yet see 8 Ed. 4. 6. If one recovers, in a court of ancient demesne, lands, whereof part are ancient demesne, and of the residue a recovery had been before had in the king's court. If the party brings debt for the damages recovered, he shall be barred of the whole, because the damages are to be given intire.

* *Vide post.* 20 A.

manor; or if he say, that in an assise brought before of the same lands or tenements at the common law against another tenant, that the tenant said that they were ancient demesne, and that they were frank-fee, &c.

11 Ed. 3. *Cause de remover, Plea*
16. If the cause assigned may be tried in ancient demesne, it shall not be removed.

Register 11. Br.
Remove de Plea
35. vid. en
17 Ed. 3. *Cause*
de Remove 1.

Because there
were but six sui-
tors, and one
plaintiff, and

the other defendant therefore removed: so four not sufficient.

whereupon it was found by the assise that they were frank-fee, &c. And another cause appeareth in the register, because that there are not any suitors in the lord's court of ancient demesne to do right, &c. But *quære* if this be a sufficient cause or not. See 4 *Inst.* 270.

Post. 14.
26 H. 8. 4.
for lands in Ga-
velkind, see
14. b.

26 H. 8. 1. 4.
8 H. 7. 11.
3 H. 6. 34.
34 H. 6. 35. or
44 Ed. 3. 10.

4 *Inst.* 270.
contra,
21 Ed. 3. 32.

Br. Auncient
Demesne 18. or
34 H. 6. 35.
1 H. 7. 30.
50 Ed. 3. 24.

the lord made
a lease for
life, that is a
good cause.
1 H. 7. 30.
per Tounsend.

If a frank-tenant of ancient demesne, who holdeth D his tenements by knights service and in fee, be ousted and disseised of his lands or tenements, he shall sue at the common law, and not in ancient demesne, for no lands are ancient demesne, but lands holden in socage.

And a man shall have a bill of *fresh force* within forty E days in the lord's court of ancient demesne, for the lands after the disseisin, and without suing any writ thereupon; as a man shall have lands in a city or borough; and there in that case, if the tenant hath any matter to prove the lands to be frank fee, he shall have a *recordare* to remove the plea out of ancient demesne into the common pleas, &c.

And although the plea in ancient demesne be there F without writ, &c. if the tenant remove the plea out of ancient demesne by a (a) *recordare*, and for cause shewed in the writ, if the cause be not good, the tenant in the

(a) *Note*; If the cause in the *recordare* be special, as, *For that he claims to hold of the infeffment of J. S. lord of the manor, &c.* there he cannot shew another cause. But if the cause be general, *viz. For that he claims to hold at the common law*, there may shew the cause specially. 9 H. 6. 34, 35.

Yet see where the tenant removed the plea, for that he claimed by prescription to hold at common law, and yet in C. B. he was received to wave this cause, and to shew a confirmation by the lord. 21 Ed. 3. 32.

common pleas shall not shew any new cause to retain the plea in the common pleas: but if the cause in the writ be, *which he claims to hold at the common law*, then in the common pleas he may shew what cause he will to retain the plea there; which cause shall prove the tenements to be frank-fee.

G And in ancient demesne, if the demandant and tenant put themselves upon the (b) grand assise, or the tenant vouch a foreigner, or plead a foreign plea, which cannot be tried in the lordship there; then a *superfedeas* shall be granted out of the chancery, directed unto the lord of ancient demesne, or his bailiffs, if the writ were directable to the bailiffs, that they should surcease, &c. And the party defendant shall sue his writ of *warranty of charter* against the vouchee, &c.

H And if the sheriff do remove the record in ancient demesne by *recordare* in the common pleas, and afterwards the bailiffs in the court of ancient demesne proceed in the plea (notwithstanding the removing of the record) then the tenant may sue a *certiorari* directed unto the justices of the common pleas, to certify the tenor of the record into the chancery, and of this removal; and upon the certificate into the chancery, the tenant shall have an (a) *attachment* against the bailiffs,

12 H. 7. Rot. 103. It is holden, that if they proceed after the record removed, and award execution, that it is not void. 16 Ed. 3. 3. *Process* 167. The party had *audita querela* against the judges upon that case: and 17 Ed. 3. *ibid.* 186. it was holden that the sheriff shall be punished for his contempt.

(b) The plea shall be removed to be tried, and afterward remanded to be adjudged, 14 H. 4. 26. See 19 H. 6. 53. on a foreign voucher, day was given to the party himself in C. B. to determine his warranty, and there a summons *ad warrantizand* issued, and the vouchee came and vouched over B. who entered into warranty, and vouched over, 5 Ed. 6. *Dyer* 69. See the tenant in a writ *ht close* sued in nature of a writ *ht* at common law, and puts

himself on the grand assise; and therefore the plea was removed *per recordare*; but it was afterwards remanded by the court, for by the custom they may elect a jury instead of the grand assise. *Stafford's Case*, *Dyer* 111. See 1 H. 7. 29. *contra*.

(a) Where the plaintiff shall have a special action on the case, and recover damages, and yet the proceedings be void, &c. See 14 Ed. 3. F. *Action sur le Case* 39.

who

[14]

who proceeded in the plea directed unto the sheriff, for to arrest them, returnable in the common pleas, to answer unto the king, and also unto the tenant who sued forth the *recordare*. But in ancient demesne, if the tenant vouch a foreigner to warranty, then the tenant ought to sue his writ of *warrantia chartæ* returnable in the common pleas against the (b) vouchee, and upon this writ sued to purchase a *superfedeas* directed unto the bailiffs of ancient demesne, commanding them to surcease until the plea in the *warrantia chartæ* be determined in the common pleas. And if the bailiffs proceed after such writ sued forth, and directed unto A them, the tenant who sued the writ may have an *attachment* of them directed unto the sheriff, &c. that he do attach them to answer in the common pleas at a certain day, &c. as well unto the king as unto the party, for the contempt, &c. But if the plea of *warrantia chartæ* be discontinued in the common pleas, then the demandant in the writ of *droit close* may sue a writ out of the chancery directed unto the justices of the common pleas, to certify the king in the chancery, if the plea of *warrantia chartæ* be pendent or discontinued, or not, so that if it be discontinued, &c. or determined, he may send unto the bailiffs of ancient demesne, that they proceed in the plea.

Vide 13 D.
29 R. 2. Ancient Demesne
41.

Sokemans.

And if the tenant claim to hold the lands of the B lord in ancient demesne by knights service, &c. the same is a good cause for to remove the plea, because that lands which are holden of the manor, which shall be taken ancient demesne, shall not be holden of the lord by other services than socage; for the tenants in ancient demesne are called *sokemans*, that is to say in *English*, tenants of the plough.

And therefore if the lord of a manor in ancient demesne, before the statute of *quia emptores terrarum*, C

(b) *Vouchee*. See 13 Ed. 1. ancient demesne, and the same law
Voucher 269. and after the warranty for a court baron. See 35 Ed. 3.
determined they shall give day to *Voucher* 316.
vouch by prefixion in the court of

maketh a feoffment in fee of the parcel of the lands of the manor, to hold of him by knights service, such tenant shall not have a *monstraverunt*, if he be distrained for other services than of right he ought to do, because his lands are not ancient demesne of the king, and yet they are holden of the manor which is ancient demesne: But it is intended of such tenures which shall do the services of the plough, *viz.* to plough and till the lord's lands, to mow the lord's meadows, or other such like services as are for the maintaining of the king's sustenance or victuals, and his subjects; and for such services such tenants have such liberties and privileges in the law, that they may the more quietly use their husbandry, and do their services.

50 Ed. 3. 6.
per Sidenham,
contr. if he
refer but socage
tenure.

Writ de Monstraverunt.

D **T**HE writ of *monstraverunt* lieth for the tenants of (a) ancient demesne who hold by free charter, and not for those tenants that hold by copy of court roll, or by the rod, according to the custom of the manor, at the will of the lord. And these tenants ought to be tenants which hold of a manor which was in the hands of S. *Edward* the king and Confessor, or in the hands of King *William* the Conqueror; which manors are called ancient demesne of the king, or the ancient demesne of the crown of *England*. And to those tenants (who hold of such manors) there are many and divers liberties, gifts and grants by the law; as to be (b) quit of toll, and passage, and such impositions which men shall de-

49 Ed. 3. 22.

(a) And therefore a tenant of a newly approved waste, though it be aliened by the king, and to hold of the manor by the custom of the manor, is (not) ancient demesne. 21 Ed. 3. 56. per Thorp. See *Hoveden* 460. *Willielmus senior Anno* 1086. *Totum Angl. describi fecit.* And see

Ingulphus 870. and 908. *pro divisione comitatum.* Vide bene 49 Ed. 3. 22.

(b) Acquitted from amerciaments of the county. *Claus.* 12 H. 3. m. 11. See 32 Ed. 3. *Monstraverunt* 6. and *Rot. Parl.* 6 Ed 3. No. 3.

mand

19 H. 6. 66. *per Newton*, Tenants in ancient demesne shall be quit of toll of things which they sell, which are arising of their lands, and so of all things which they buy, which are for the manurance of the land; but *quære* if they shall be quit for all things bought and sold.

Vide 161. They shall be quit of suit to leets and hundreds. *Vide* 22 El. Dyer 377. Register 181. Br. Ancient Demesne 44. 7 H. 6. 35. Martin. acc'.

40 Ed. 3. 44.
Quære if they shall have this writ without being distrained.

mand of them for the goods or chattels sold or bought by them in fairs or markets; and to be quit of taxes and tallages granted by parliament; if not, that the king lay a tax upon ancient demesne, as he may for some great cause, whensoever it seemeth good unto him. And also tenant in ancient demesne ought to be acquitted of the payment of the expences of the knights which came to parliaments, and also they (c) ought not to be impanelled or put upon juries or inquests in the country out of their manor or seigniory of ancient demesne, if they have not F other lands at the common law, for which they ought to be charged, &c. And if such tenants, or any of them who hold of the manor of ancient demesne, be distrained to do unto their lords other services or customs than they or their ancestors have used to do, then they may sue this writ of *monstraverunt* directed unto the lord, commanding him that he do not distrain them to do other services or customs than they have used to do: or they may have this writ of *monstraverunt* directed unto the sheriff; and that is where the writ of *monstraverunt* is first sent unto the lord, and that he do not distrain his tenants, &c. Or they, upon this writ sued and directed unto the lord, may have and sue another writ directed unto the sheriff, rehearsing, that where he hath sent his writ unto the lord of ancient demesne, that he should not distrain his tenants, &c. and if the lord will not do it, and suffer the tenants to be in peace, that then the sheriff shall do it, and cause the lord to suffer the tenants to be in peace, and that he do not distrain them for other services than of right they ought to do. And the form of the writ directed unto the lord is such: (a)

(c) *i. e.* If they have not other lands in frank fee. 42 Aff. 8.

(a) See this writ of *monstraverunt* founded on a petition and ordinance of parliament. 18 Ed. 1. 27.

G The king to the abbot of C. greeting: Your men of the manor of I. which is of the ancient demesne of the crown of England, as it is said, have shewed unto us, that you require of them other customs and other services than they ought to do, and than their ancestors, tenants of the same manor, have been accustomed to do in the times wherein that manor was in the hands of our progenitors, formerly kings of England, or in our hand. And therefore we command you, that you require not, or permit to be required from the aforesaid men, other customs and other services than they (b) ought to do, and than their ancestors aforesaid have been (b) accustomed to do in the times aforesaid. And unless you shall do this at our command, we command A. our sheriff of Lincolnshire, to do it. Witness, &c. And upon this writ they may sue another writ of monstraverunt directed unto the sheriff, which shall be in this form: The king to the sheriff of Lincolnshire, &c. The men of the abbot of the manor of I. which is of the ancient demesne of the crown of England, as it is said, have shewed unto us, that the same abbot requires of them other customs and other services than they ought to do, &c. (as above, until) in our hand. Wherefore we commanded the same abbot, that he should not require, or permit to be required from the aforesaid men, other customs or other services than they ought to do, and than their ancestors aforesaid have been accustomed to do in the times aforesaid. And therefore we command you, that unless the same abbot shall do this our command, that you cause it to be done, that we may hear no more clamour thereupon for want of justice, &c.

40 Ed. 3.
These words
prove that they
may have this
writ before
distress.

[15]

(b) *Quære*, If he shall not have a *monstraverunt* where his estate is confirmed, to hold by less services. 49 Ed. 3. 7. See 21 Ed. 3. 33. F. Cause de remover Plea 18. Where it is adjudged, that it is not made frank-fee by the confirmation. But *Wilby* held the contrary. *Hill* said, no *monstraverunt* can be, &c.

See 30 Ed. 18. where it is argued,

if the lord in ancient demesne confirm the estate of his tenant to hold by 2 s. freely and quietly from all other customs, and held by *Green* to be frank-fee, and on a distress for more services, the tenants shall be aided in replevin. But by *Wilby* and others, it continues ancient demesne, and he shall have a *monstraverunt*, and count upon his case.

And

And it seemeth, that by this writ directed unto the B
 sheriff, the sheriff may charge the lord, that he do not
 demand nor distrain them for other services than they
 ought to do, and that the sheriff may make resistance
 and rescous unto the lord, if he distrain the tenants for
 other services, &c. and that the sheriff may take the
 power of the county to resist the lord in such case, or
 the sheriff may command the neighbours, who dwell
 next to the manor, that they resist and do rescous unto
 the lord, if he will distrain his tenants, &c. And it C
 seems they may justify the same by the commandment of
 the sheriff, if he have such a writ sent unto him, &c.
 And after the writ directed unto the sheriff, if the lord
 distrain, the tenants may sue an *attachment* against him,
 returnable in the common pleas or the king's bench, D
 to answer to them for this contempt; and if it be found
 for them, they shall recover their damages.

Com. 129.
 3 H. 6. 26.
 1 H. 5. 13.

And note, that the writ of *monstraverunt* shall be sued
 by many of the tenants without naming any of them
 by their proper names, but generally, *monstraverunt nobis
 homines*, &c. But in the attachment against the lord
 by the tenants, the tenants ought to be named by their
 proper names, thus:

(a) *The king, &c. If A. of B. C. of F. and the men
 of the abbot M. of the manor of I. which is of the ancient
 demesne of the crown of England, as it is said, shall make
 you secure, &c. then put, &c. the aforesaid abbot, that he be
 before us, &c. wheresoever, &c. to shew why he requireth
 of the aforesaid men other customs and other services than
 they ought to do, and than their ancestors, tenants of the same
 manor, have been accustomed to do in the times wherein that
 manor was in the hands of our progenitors, formerly kings
 of England, or in our hand, contrary to our prohibition*

(a) In a writ of admeasurement it
 is not necessary to name all the te-
 nants; for they shall be admeasured,
 though not named. 8 H. 6. 26.
 And in an action on the statute of
Winton, it is not necessary to name
 all the inhabitants of the hundred,

but only some in certain. And so
 in a *recordare* adjudged, 6 H. 8. and
 also 3 *Eliz.* But the justices shall
 direct judgment to be for the plain-
 tiff notwithstanding. See 6, 7 *Eliz.*
Dyer.—

(if

(if the case be so). *And have you there the names of the pledges and this writ. Witness, &c.*

E And there is another writ of *monstraverunt*; where the tenants of any hamlet, which hamlet is parcel of a manor of ancient demesne, are distrained by the lord, they shall have such writ:

The king, &c. Your men of the hamlet of I. which is a member of the manor of B. which is of the ancient demesne of the crown of England, as it is said, &c. have shewed unto us, &c.

F And it seems, that in the writ of *attachment* he ought or may name all those tenants by their proper names which are distrained after the prohibition delivered unto the lord; and it behoveth not to name other tenants
G by their proper names, but in the generality, *And the men, &c.* And if one of those, who is named by his proper name, will not sue, &c. he shall be severed, &c. And he that is *non suit* shall not grieve his companions. And it seemeth, that every one shall recover his damages *severally*, (b) *because they are severally distrained*, and one may be more damnified than another, &c.

H And one tenant may sue the writ of *attachment* in his own name by his proper name, and in the name of the other tenants, by general words, &c. *And the men, &c.*

I And if the tenants do sue an *attachment* against the lord, because he distrained them after the writ of *monstraverunt* delivered unto him, and pending the writ of *attachment* the lord distrain them again by their goods; then the tenants shall have a special writ of *attachment* against the lord, rehearsing the matter; and in the same writ the sheriff shall be commanded to re-deliver unto the tenants their goods, if the lord have taken them, &c. And this writ shall be sued only in the name of those tenants which are again distrained pendant the suit, and not in the name of them all, as the other writ is sued; and the writ shall be such:

(b) Note; They may make joint or several counts. 39 Ed. 3. 6. per Belkn. See *infra* 16. A.

[16]

The king to the sheriff, &c. If A. and B. the men of the abbot of C. of the manor of N. which is of ancient demesne, &c. shall make you secure, &c. then put, &c. the aforesaid abbot, &c. to shew why whereas lately at the prosecution of the said men suggesting to us, that the aforesaid abbot had required other customs and other services than they ought to do, and than their ancestors, tenants of the same manor, &c. (until kings of England) We commanded you, that you should put by gages and safe pledges the aforesaid abbot, that he should be before us from Easter day in fifteen days last past, wheresoever, &c. to answer the aforesaid men concerning the premisses, the said abbot (pending the said plea of attachment before us) hath therefore more grievously distressed the aforesaid men, and hath taken from them all their goods, chattels and cattle found in the same manor, and yet detains them from them, whereby they are less able to prosecute the said plea of attachment, because of poverty, in contempt of us and our aforesaid command, and to the no small expence of the aforesaid men and the delay of the prosecution of their right, and to the manifest debasing of their estate, And cause the aforesaid cattle, goods and chattels in the mean time to be delivered to the same men by sufficient security. And have there the names of the pledges and this writ. Witness, &c.

V. sup. 15. G.
39 Ed. 3. 6.
48 Ed. 3. 44.
39 Ed. 3. 6.
ret. Monstr. 2.
49 Ed. 3.
per Belknap.

And in this writ of *Monstraverunt* the plaintiffs in the writ of attachment may count severally, and then they shall recover several damages. But they may count together in one count, and declare how they were severally distrained, &c. and it is not necessary to alledge in the count the day or the place where the lord distrained them. And the form of the count or declaration is such :

A. B. was summoned to answer C. D. and F. and the men of the aforesaid A. of the manor of S. which is of the ancient demesne of the crown of England, &c. of a plea, wherefore he requires of them other customs and other services than they ought to do, and than their ancestors, tenants of the same manor, have been accustomed to do in the times wherein that manor was in the hands of his majesty's progenitors,

genitors, kings of England, to the great damage of the said C. D. and F. &c. And whereupon the same men, by T. S. their attorney, complain, that whereas their ancestors, tenants of the same manor in the time when that manor was in the hands of lord Henry, formerly king of England, great grandfather to the grandfather of the lord the present king, held their tenements by certain services, namely, every one of them held one yard-land of the same manor, &c. by fealty and the service of five shillings, and doing suit at the court of the said manor of S. twice in the year, to wit, at the feast of Saint Michael and at the feast of the passover; and if a writ of right happened to be pleaded in the same court, by doing suit in the same court from three weeks to three weeks, &c. so long as that writ was depending in the same court, and when the lord the king lays a tax (or tallage) upon his boroughs and his demesnes, &c. for all services; and they who held more land of the aforesaid manor rendered more rent, &c. And the same tenants have continued this kind of estate from the time of the same Henry the great grandfather, &c. from king to king, the progenitors, &c. until the time of the aforesaid lord king Edward the grandfather, &c. That the aforesaid A. lord of the manor aforesaid, hath distrained them the said C. D. and F. and the other men, &c. to do suit at the aforementioned court from three weeks to three weeks throughout the whole year, &c. and by laying a tax (or tallage) upon them, high and low, at his will, and requiring services from them for marrying their sons and daughters, and other villainous services and customs, which they ought not nor have been used to do; whereupon they say they are injured and have sustained damage to the value of one hundred pounds, and thereupon they bring suit, &c.

B And whether they shall recover severally damages upon the joint count, it is a doubt, yet it seemeth reasonable that they may, because it is several in its nature, because they count upon the several tenures, &c. and how that he hath distrained them severally; by which it seems but reasonable, that the jury do inquire of the damages severally, if they pass for the demandants, or that several writs of inquiry of damages be awarded in that case, if the matter be adjudged with the demandants.

E 2

But

But it seems no tenant shall recover damages, but those who are specially named in the writ of attachment sued upon the *monstraverunt*, and not to other men.

49 Ed. 3. 22.

39 Ed. 3. 6.

19 Ed. 3. pl. 5.

And note, That the lord of ancient demesne shall not C
be put to answer to the writ of attachment sued against him upon the *monstraverunt*, before the court be (a) certified by the treasurer and chamberlain of the exchequer, whether the manor be ancient demesne. And therefore it behoveth the plaintiffs in the *monstraverunt* to sue forth a special writ unto the treasurer and chamberlains of the exchequer to certify the same; and the writ is such:

The king to his treasurer and chamberlains, greeting: because for certain reasons we are willing to be certified whether the manor of I. in the county of C. be of the ancient demesne of the crown of England or not, we command you, that having searched our Domesday book, you without delay distinctly and openly make us more certain concerning that which you thereupon shall find, under our seal of our exchequer, sending again to us this writ. Witness, &c.

49 Ed. 3. 22.

And note, That the book which is called *Domesday* D
book was made in the time of S. Edward, and all the lands which were in the seisin, and in the hands of the said S. Edward at the time the said book was made, are ancient demesne, and the lands which were in other hands, and are not named in the said book, are frank-fee: and those tenants which held in base tenure, as E
by copy of court-roll, or by the rod, cannot sue nor maintain this writ against the lord: and the death of one tenant, nor his nonsuit, shall not (b) abate the writ. And if the frank-tenants, and the tenants by base

2 R. 3. 1.

39 Ed. 3. 6.

44 Ed. 3. 44.

41 Ed. 3. pl. 3.

19 Ed. 3. pl. 5.

1 H. 5. 13.

(a) It seems, that the certificate lawfully coming into court by *certiorari* and *mittimus* is authentic and conclusive, though there be no issue joined, whether frank-fee or ancient demesne, 7 H. 6. 32. And see accordant 39 Ed. 3. 6. it is at the peril of the plaintiff.

(b) The reason is, because as they are several tenures, so the torts and damages are several, and so it is in error, attaint and *audita querela*; contra in a *ne injuste vexes*. 1 H. 5. 13. Although the count in the *monstraverunt* be joint. 19 Ed. 3. *Monstraverunt* 5.

tenure

F tenure join in a *Monstraverunt*, the writ shall not abate, but for the tenants by base tenure only.

Writ de Warrantia Diei.

[17]

A **W**RIT of *warrantia diei* lieth in case where a man hath day in any action brought against him to appear in proper person, and the king at or before the day send him in or about his service, so as he cannot appear in court at the day; then may he sue forth this writ directed to the justices, reciting the whole matter, commanding them that they do not record his default for that day, for the cause before mentioned: and it is not material, whether the cause be true or not, when the king doth certify that the party is in his service. For it seemeth by the words of the writ, that the king by his prerogative may warrant this default for a day. And so it seemeth, that if the tenant in a *præcipe quod reddat* at the *grand cape*, or the *petit cape* returned, make default, that before judgment upon this default the king may send such a writ unto the justices, rehearsing that the party is in his service, and commanding them that his default do not prejudice him: *And it standeth with reason that the king may so do, because that every one is bound to serve the king in his business.* But what process shall the court award, if the tenant will not appear at the day of the default recorded, nor after, when the writ of *warrantia diei* comes unto the justices? It seemeth a new summons shall issue out of the common pleas to summon the tenant anew, because that his default at his return is excused by the writ of *warrantia diei*. But if the writ *warrantia diei* do not excuse the default at the *grand cape*, then it seems a new *grand cape* shall go forth upon the first default returned at the summons of the *præcipe quod reddat*. *Quære* of that. And the king may grant such writs to save two defaults at two several days, &c. *Quære* of these matters, because they are out of use at this day. But the form of the writ is such:

The king to his justices of the bench, greeting : Know ye, D that A. was in our service by our command on Monday the morrow of fifteen days of Easter last past ; so that on that day he could not be present at the plea which is before you by our writ, between B. demandant, and the aforesaid A. tenant, of one messuage with the appurtenances in N. whereupon the same A. as he saith, hath vouched C. to warranty thereof against the aforesaid B. And therefore we command you, that the aforesaid A. be not put in default for his absence on that day, nor lose in any thing, because, as to this matter, we will warrant to him that day. Witness, &c.

The form of a writ to sue two defaults is : The king, &c. (as above) : Know ye, that A. was in our service by our command on Thursday in eight days of Saint Hilary, and on Monday in the morrow of All Souls last past ; so that on those days he could not be present at the plea which is before us by our writ, between, &c. And therefore we command you, that the aforesaid A. be not put in default for his absence on those days, because, as to this matter, we will warrant to him those days. Witness, &c.

And these two writs are not granted but by the king E himself by the rule of the register ; and the king may grant such writs unto the mayor and sheriffs of London, or unto the bishop of Durham in the county palatine, or unto the justices of assise or in the eyre, or unto the sheriff : and these writs may be granted as well for the demandant and plaintiff as for the tenant ; and then the writ is such :

The king, &c. Know ye, that A. was in our service on F Monday in the morrow of fifteen days of Easter last past ; so that, &c. between him, A. demandant, and B. tenant, &c. And there it shall be said, in the morrow of fifteen days of Easter, because that the pleas (a) cannot be holden in fifteen days of Easter, because that is Sunday, which is the sabbath day. And the king may grant this writ by testimony of his steward, thus :

Dyer 154.
Ante 15 P.

(a) See the case of *Huggard and Knevett*, 5 Mar. Dyer 154. & ante 15. P.

The king, &c. Because A. was before our steward and marshal on Monday in fifteen days of Saint John the Baptist last past, in divers inquisitions which were summoned before the same steward and marshal on the aforesaid day at E. as our same steward hath testified before us: We command you, that you do not amerce the aforesaid A. for that, because he came not before you in other inquisitions which were summoned before you on the same day, nor suffer him to lose issues, if he hath been liable to lose any before you, upon that occasion. Witness, &c.

G And it seems by this writ, that the justices ought to make a special entry thereof, and to save the issue of this juror, and also to make a special estreat of this matter, and to levy no issues upon these jurors, for whom such writs come unto the justices.

H And if a man be essoined of the king's service in any action, &c. whereas in truth he is not in the king's service, then the plaintiff or demandant may sue forth a special writ out of the chancery directed unto the justices, rehearsing that he is not in the king's service, commanding them to proceed. But by the statute of *Gloucester*, if he do not bring his warrant at the day given, he shall lose twenty shillings for the journey; and shall be in the king's mercy, and the essoin dissolved. And if the plaintiff purchase such writ directed to the justices, that he is not in the king's service, then the essoin shall not be adjourned, but shall be presently quashed, and he shall not have day by adjournment to bring in his warrant to warrant the essoin.

* *Writ of False Judgment.*

22 Aff. 64.
Br. Error 120.
If the freehold-
ers be recorded
by plea, where
it ought to be by
writ, it is error,
and not void,
& *coram non*
judice: but
where judg-
ment is given
of lands, con-
tract or cove-
nant, which is
out of their ju-
risdiction, it is void, & *coram non judice*.

WRIT of false judgment lieth where false judg-
ment is given in the county, or in the hundred,
or in other court baron which is not a court of record,
in a plea real or personal, as if in a writ of right patent,
or in other personal plea; there the party, plaintiff or
defendant, which is grieved, shall have this writ, and
the writ shall issue first out of the chancery: and if the **A**
false judgment be given in the sheriff's county court,
then the writ shall be directed unto the sheriff himself,
and shall be such:

V. 4 & 5 Ma.
Dyer 164.
The writ was
challenged be-
cause it was under
your seal and the
seals of four law-
ful men of the
same court, and
good, as it seems.
Vide Dyer 373.
& infra D.

Henry, &c. to the sheriff of Lincolnshire, greeting: If **B**
A. shall make you secure, &c. then in your full county cause
to be recorded the plaint which is in the (a) same county by
our writ of right, between **A.** demandant, and **B.** tenant,
of one messuage and one hundred acres of land with the ap-
purtenances in **C.** whereof the same **A.** complains that false
judgment hath been done to him in the same county; and have
you that record before our justices at Westminster such a day
under your seal, and by four lawful knights of the same county
of those who were present at that record: and summon by
good summoners the aforesaid **B.** that he be then there to hear
that record. And have you there the summoners, the names
of the four knights, and this writ.

15 Ed. 3. 9.

And if the tenant hath aliened the land after judg- **C**
ment given against the demandant, then the summons

* *Note*; In a writ of false judg-
ment, if the judgment be reversed,
the suitors are amerced, and the court
shall give the former judgment which
the suitors ought to have given,
22 Ed. 3. 2. And *Note*; the amer-
ciament was affected by the justices,
9 Eliz. Dyer 263. See *Pasc.* 10 Ed.
3. *Kot.* 3. whereby it appears, if the

plea be discontinued, and afterwards
the plaintiff is nonsuit, and judg-
ment final given against him on a
writ of false judgment, he shall be
restored to the right only. See *Dyer*
373

(a) *Note*; The words *same county*
ought to be *same court*, &c. *Quere.*
See *Dyer* 268.

shall

shall be made in the writ against him who is tenant of the land, and against him who was tenant at the time of the judgment given, by these words, *viz. And summon by good summoners the aforesaid B. and C. who now hold that messuage and land, that they be then there to hear, &c.*

D And if the false judgment be given in another court baron than in the sheriff's court, then the writ of false judgment is called a writ of *accedas ad curiam*, and shall be directed unto the sheriff; and the writ is such:

The king to the sheriff of Lincolnshire, greeting: If A. shall make you secure to prosecute his claim, then having taken with you four discreet and lawful knights of your county, go in your own person to the court baron of C. and in that full court cause to be recorded the plaint which was in the same court by our writ of right, between A. demandant, and B. tenant, of one messuage, &c. whereof A. complains that false judgment hath been done to him in the same court; and have that record, &c. under your seal, and (a) by four V. Supra B.
lawful men of the same court of those who were present at that record: and summon, &c. and have you there the names of the aforesaid four men, and this writ.

E And in this writ of *accedas ad curiam* he shall take with him four men, but it needeth not that they be knights: but so shall it not be in the other writ of *recordare facias loquelam*, which is in the county. But both writs shall be returned under the sheriff's seal, and the seals of four of the suitors of the same court. And in the writ of false judgment which is *accedas ad curiam*, it is a (b) good return for the sheriff for to say, that

(a) Note; It is by four lawful, &c. and not under the seals of four lawful men. *Dyer* 164. and see *ibid.* 373.

(b) Note; If the sheriff return, that the suitors will not record *le parol* (or plea) a *sicut alias distringas* shall issue against all the suitors: and if at the day some of the suitors do appear, and others do not, the court here shall accept the record by the hands of those that appear; for per-

haps at the *distringas sicut alias* the others will disavow the record; but their issues shall be saved, and the *distringas sicut alias* shall issue as well against those that appear as against the others. And by *Hill*, if on the first writ the record had been delivered to four suitors, and two of them had appeared, and the other two made default, the record had been (well) accepted. See 1 *Ed.* 3. 9. 26 *Ed.* 3. 61.

that after the receipt of the writ, and before the return thereof, no court was holden; and also that he required the lord to hold his court, and he would not, so as he could not execute the same. And thereupon the justices shall award a *distringas* directed unto the sheriff, to distrain the lord to hold his court; and *sicut alias*, &c.

(c) In a false judgment against an abbot the plaintiff F was nonsuit, and the abbot had a *scire facias* against the plaintiff, to shew why he should not have execution, and to have the judgment executed returnable at 15 *Pasch.* at which day the plaintiff appeared, and assigned his errors, and tendered sureties to sue with effect, and prayed a *scire facias* against the abbot to hear errors. And the opinion of the court was, that he might assign the errors against the abbot without suing any *scire facias* against him, because they had day by the roll.

(d) If the writ of false judgment abate for default G in the writ, then the plaintiff shall not have a *scire facias* ad

3. 61. 12 H. 4. 23. And an *idem dies* shall be given to those that appear, according to 29 Ed. 3. 26. * For it may be, that at the other day those who now appear may make default. But if the sheriff returns the names of those who refuse, the *distringas* shall issue only against them; and if any of them make default, the record shall not be received by the hands of those that appear, but their issues shall be saved, and a new *distringas* shall go both against them and those who made default. 9 Eliz. Dyer 262.

(c) See 6 Ed. 6. Dyer 76. b. Error on a judgment in a *quare impedit*, the record was removed, but the party did not assign errors; wherefore he that recovered brought a *scire facias* to have execution. It appears the party warned may come in at the day to assign errors without a *scire*

facias ad audiendum errores. 21 H. 6. 34. & 20 H. 6. 18.

(d) If a record be removed by writ of error, though the writ be abated for default of form, yet the judgment being of record before the writ of error, and the record being here, the party shall have a new writ of error, *quoad coram vobis*: but by the writ of false judgment, that which was (not) a record before is to be made a record; and therefore if the writ be abated (as in a writ of false judgment on a judgment in ancient demesne, was in *cur' regis* where it should be *regine*) there is not any record made or removed, but only an *escrow*, and is as if the suitors had brought in the record without a writ to warrant it; and therefore the plaintiff in that case, after such writ abated, shall not have a *scire facias* to warn the party *ad audiendum errores*, &c. But it

* 12 H. 4. 23.

ad audiend' errores upon the record certified, because it cometh without an original, when the original abateth. But if the plaintiff die, it seems that if the false judgment be given in the base court upon a writ of *droit patent*, that then this heir shall have a *scire facias ad audiend' errores* against him who recovereth upon that record which is removed into the common pleas. And if the plaintiff in the writ of false judgment be nonsuit, whether the other party shall sue execution upon this record so removed against the plaintiff, without suing forth a *scire facias*, is a question. But *Hill. 23 H. 6.* the opinion was, that he shall have execution without suing forth a *scire facias*.

20 H. 6. 18.
44 H. 6. 48.
31 H. 6. 51.
14 H. 4. 39.
7 Ed. 4. 23.
34 H. 6. 48.
Contrary, if the justices be removed in the king's bench by a pone.

H And tenant at will according to the custom of the manor, which is tenant by copy of court roll, shall not have a writ of false judgment upon a judgment given against him: but where false judgment is given upon

seems the plaintiff shall have a new writ of false judgment, because the record is not removed: *Quere*; for it was denied by *Rolpb. 3 H. 6. 26.* But where a writ of false judgment abates by death of the party, there, for that the record was well made and removed, a *scire facias* lies. *Dyer 164. 15 H. 6. F. False Judgment 17,* and so note the diversity. In a *recordari* out of ancient demesne, the parol shall be remanded, if the plaintiff is nonsuit. *2 Ed. 3. 29. 10 Ed. 3. 59.* And so if the cause assigned be not sufficient or not true. *34 H. 6. 35.* See here *13. B. C.* But on a writ of error or false judgment, if the plaintiff be nonsuit, judgment shall not be affirmed or disaffirmed, but a *scire facias* shall issue to have execution upon the record, *20 H. 6. 18.* and see there, if the plaintiff be nonsuit, he shall not assign errors on the same writ of false judgment, but (as it seems) is put to a new writ. Yet *quere*; for the record is here, and not in the inferior court. See *21 H. 6. 34.* in the case of the abbot of

Tavesstock. If the plaintiff in a writ of false judgment be nonsuited, and the defendant sues a *scire facias* to have execution, &c. (1.) The plaintiff may have a new writ of false judgment, &c. *quod coram vobis residet.* (2.) On the *scire facias* to have execution, he may assign his errors without any new *scire facias*; because both parties have day in court. (3.) It seems, that if the plaintiff had appeared on the writ of false judgment before, now his assigning of errors shall not delay the defendant of his execution. In error, if the plaintiff be nonsuited before *scire facias*, whereupon the other sues a *scire facias quare executionem non*, &c. he may assign errors on the same *scire facias*. But if he had sued a *scire facias ad audiend' errores*, and afterwards became nonsuit, there, on the *scire facias* by the other, he shall have execution, and shall not be driven to answer to the errors. *Quere*, and see the book at large; for the case seems to be misput.

a writ

a writ of *justicies* directed unto the sheriff, the party grieved shall have *faux judgment*, and not a writ of error, although the judgment be of debt, or trespass, over the sum of twenty shillings.

2 H. 4. 4.
21 Ed. 3. 45.
45 Ed. 3. 1.
acc^r. therefore
it seemeth error
lieth in a court
of pipowder.
Vide 13 Ed. 4.
18. 6 Ed. 4.
43. 72. 4. 23.

And a man shall not have a writ of false judgment but in the court where there are suitors; for if there be no suitors, there the record cannot be certified by them. And upon false judgment given in court before bailiffs, or others who hold plea by prescription, in every sum in debt by bill before them, he shall not have a *faux judgment*, but a writ of error thereupon. *Quod vide M. 4 Ed. 4. in title Trespass. Post. 19. I.*

20 Ed. 3. pl. 11.
31 Ed. 3. pl. 10.
38 Ed. 3. 34.
25 Ed. 3. pl. 9.

In false judgment upon a writ of right patent, or a writ of *droit close*, the plaintiff shall not assign errors before the records certified, as well (a) the original as the residue of the record. And the writ of false judgment lieth against a stranger to the judgment, if he be tenant of the land, without naming him who was tenant, and party to the judgment. Otherwise it is of a writ of error, for there he ought to name him who was party to the judgment, be he tenant or not (b).

[19]

21 H. 4. 23.
contr^r, and
21 H. 6. 34.
the party had
a *scire facias*
to have execu-
tion out of the
common pleas.

And where the tenant loseth his land by false judgment in a writ of right in a court baron, he shall not have a writ of false judgment before that the demandant hath entered upon him, &c. *Quod vide M. 38 Ed. 3. 15. Vide 8 Ed. 4. 19.*

And where the defendant in *faux judgment*, after appearance by him, maketh default, a grand distress shall issue out against him. And if he again make default, or cometh and will not save his default, the plaintiff

(a) See 31 Ed. 3. F. False Judgment 10. If judgment be given in a court baron without an *original*, and the tenant is ousted, it is a disseisin. See 19 Ed. 2. False Judgment 19. accordant. Note; A copyholder shall be relieved by petition to the lord. Mich. 8, 9 Eliz. Rot. 136. *vide ante*.

(b) Or his heir, &c. *Quære* if he dies without heir. 9 H. 6. 46 and

49. But if another than the heir be tenant, it is the safer course to have a *scire facias* against him, especially before that the court proceeds to the examination of the errors. So *quacunque via*, there ought to be a *scire facias* against him, either before the errors examined or after, for otherwise if he be ousted, he shall have an assise. Dyer 321.

in the writ of false judgment shall have judgment to recover seisin of the land against him: *Quod vide M. 13 Ed. 2.* And the writ of false judgment given in ancient demesne is such:

C *The king to the sheriff, greeting: If A. shall make you secure, &c. go to the court B. &c. and cause to be recorded the plaint, which is in the same court by our little writ of right, between A. demandant, &c. And have there the names of the aforesaid four men, this writ and the other writ, &c.*

D And in a writ of *droit close*, if the writ of the (c) demandant be abated, whereupon he bringeth his writ of false judgment in the common pleas, and there the judgment is reversed, and the writ awarded good; then he shall hold plea in the common pleas, and a judicial writ shall issue from the common pleas, in nature of protestation made in the first writ; and if the protestation were in the nature of assise of *Mortdauncester*, the justices shall direct a writ unto the sheriff to summon the jurors to come out of ancient demesne thither, and all the matter shall be tried and determined in the common pleas: and although the judgment be given of the land in the common pleas: yet the land shall be ancient demesne. *Quod vide M. 3 Ed. 3. in title of Faux Judgment. 4 Inst. 270.*

E And upon the writ of *faux judgment*, which is an *accedas ad curiam*, if the sheriff return that the writ came so late, that he could not execute the same; then he shall have a *sicut alias* directed unto the same sheriff: and if he return not that at the day, then he shall have a *pluries* to the same sheriff. And he may have these writs of *alias* and *pluries* out of the common pleas, where the first writ was returned *tarde*, if he will, or he may have them out of the chancery, &c. See for this matter in the book of * *Entries*,

In Hill. 6 W. 3. B. R. Int' Phillips and Bury, it was held by Holt accordant, and the Opinion of Dyer 373. denied, because not warranted by 34 Aff. 40.

* See 29 H. 6. Fitz. Return de Viscount 21. 6 H. 7. 15, 16.

(c) And so it seems, whether the judgment be affirmed or disaffirmed, execution shall be awarded in the king's court. 39 H. 6. 5. a. And so on a non-suit where a writ of false judgment is brought before execution sued. 12 H. 4. 23. pl. 5. Yet see *Dyer 373.* If the demandant brings

a false judgment, and it be reversed, he shall only be restored to his action.

Note, That of a judgment given in ancient demesne of lands at common law, a writ of false judgment does not lie, because it is *coram non iudice*. 7 H. 4. 28. b.

fol.

fol. 114 and 115. And upon the *accedas ad curiam*, if the sheriff return, that he will go unto the said court, &c. and there pray the lord to hold his court, that he may do execution of the writ, and that the lord refuseth to hold his court, &c. by reason whereof he cannot do execution of the writ; then a *distringas* shall issue out of the common pleas directed to the sheriff, to distrain the lord, so that he distrain him to hold his court at a certain day appointed by the sheriff; *And that the sheriff having taken with him four discreet knights, &c. of the county, &c. he go to the court, &c. and that he make known here in fifteen days of Easter, &c. and that he then have that record, &c. and that he summon the aforesaid I. that he be there to hear that record, &c.* Which see in the Book of Entries, *fol. 117. 137. b.*

There is another writ of *faux judgment*; when there is a **F** plaint in the county of debt or trespass without any writ, then the writ of *faux judgment* in the county shall be thus: *Cause to be recorded the plaint which was in the same court without our writ, between, &c. of a certain trespass, &c. whereof the same A. complains that false judgment hath been done unto him, &c.* And where *faux judgment* is given in another court than the county, upon a plaint, or upon a writ, then the writ shall be thus:

The king to the sheriff, greeting: If A. shall make you secure, &c. then go to the hundred of A. of B. or to the court of A. of B. and in the full hundred or court cause to be recorded the plaint which is in the same hundred or court by our writ or without our writ, of that that the same A. keep with the aforesaid B. the covenant made between them, of one messuage with the appurtenances in F. whereof he complains, &c.

And if a baron and feme be sued in a court baron by a **G** writ of right, and the feme is received for the default of the husband, and plead there, and false judgment is given against him, she and the husband may have a writ of false judgment, as appeareth by the register.

And there is another writ there, where the husband and wife pray to be received in a court baron in a writ of right upon the default of tenant for term of life, and were not received; and for false judgment given against the tenant for term of life they shall have a writ of false judgment, &c.

There

H There is another writ of *faux judgment* in the register for him in the reversion, who prayeth to be received in a court baron on a writ of right upon the default of two tenants for life, where he was received for the reversion of one of the tenants, and the receipt was counterpleaded for the reversion of the other tenant, and judgment given, &c. And there it appeareth, that one tenant was tenant of certain parcel of the land, and the other tenant was tenant of the other parcel of the land.

I There is another writ of *faux judgment* for him that hath judgment given against him in the court of a lord, who hath power to hold pleas before his bailiffs by the king's charter: but it seemeth, that in that case he shall have a writ of *error*, and not a writ of *faux judgment*.

Ante 18 H. 32
Ed. 3 pl. 8.

K There is another writ of *faux judgment* directed unto the sheriff, viz. *Accedas ad Curiam: To our court of Winchester, and in that full court cause to be recorded the plaint which was in the same court without our writ according to the custom of the aforesaid city, between W. demandant, and D. tenant, of one messuage in Winchester aforesaid, whereof the same W. &c. complains that false judgment hath been done unto him.* But

L upon assise of *fresh force* a writ of false judgment doth not lie, but a writ of *error*. And if the writ of false judgment be returned before the justices of the common pleas, and the defendant comes and saith and averreth, that the record is otherwise than it is certified, the averment shall be received, and that issue shall be tried by the country, or by those who were present in court when the record was made, and by others of the country; and if they come not, then the inquest shall be by the country, as appeareth by the statute *de anno 1 Ed. 3. cap. 5. Rastal, Faux Judgment 2.*

[20]
1 Ed. 3. c. 5.

34 H. 6. 42.

Writ de Executione Judicii.

A **W** R I T *de Executione Judicii* lieth where judgment is given in the court of any lord upon a *Writ of Right Patent*, or upon a plea of debt or trespass in the same court, or in the hundred, county, court baron, or in any other court of record; and if the sheriff or the bailiff

bailiff will not do execution of the judgment, then the party shall have this writ directed unto the sheriff or the bailiff in which court the execution ought to be; and if they will not do execution, he shall have an *alias* and a *pluries*, with this clause in the writ of *pluries*, *Or signify to us the cause why*, &c. And if they do not execution upon this writ, or return not some reasonable cause wherefore they delay the execution, the party shall have an attachment against him who ought to have done the execution returnable into the king's bench, or into the common pleas. And if the plea be in the lord's court baron, then the writ of execution shall be directed unto the bailiff of the court. B But if the plea and the judgment be given in the sheriff's court, as in the county court, then the writ shall be directed unto the sheriff himself to do execution, and the *alias* and *pluries* shall be to the same sheriff; and if they will not do execution of the judgment, then an attachment against the sheriff shall be directed unto the coroners, returnable as abovesaid, to answer, &c. And so if the writ *de executione judicii* be directed to the bailiffs of any court of any lord, or unto the bailiffs of a hundred, to do execution, and at the *alias* and *pluries* they will do nothing, the attachment shall be to the sheriffs against the bailiffs, returnable as aforesaid, to answer, &c. And if the judgment be in a court of record, then it seemeth that the writ *de executione judicii* shall be directed unto the justices of the same court where the judgment was given, to do execution, and not unto the officer of the court. For if the officer of the court will not execute the writs directed unto him, nor return them as he ought, the judges of the court may amerce him. The form of the writ is :

Henry, &c. Lancaster, greeting : *We command you, that* C
without delay you cause execution to be done of the judgment lately given in your county of a plaint which was in the same county by our writ of right, between A. demandant, and B. tenant, of one messuage with the appurtenances in I, &c. Witnesses, &c. (a)

(a) Of execution, &c. in a court baron. In replevin the defendant pleads, that he recovered on a plaint in debt thirty-eight shillings, affirmed in

(b) *Writ de Error.*

D **A** Writ of error properly lieth where false judgment is given in any court which is a court of record, as in the common pleas, or in *London*, or other city, or other place where they have power to hold plea by the king's charter, or by prescription, in any sum in debt or trespass over the sum of forty shillings. And if false judgment be given in *London*, or other place which is a court of record, the party grieved shall have a writ of error, and this writ may be returned into the common pleas, or in the king's bench, at the pleasure of him who sueth the same.

28 H. 6. 11.
The form of writ of error to the justices of the common pleas is *Job: Prisot Capital. Just. & sociis suis, & non Capital. Just. tantum*; for the records there are not before him alone. But in the exchequer the writ is not

Tthesaurario & Baronibus, but *Baronibus tantum*. 34 H. 6. 27. Error was brought the third day from the return, where the judgment was the first day, and well, because after the judgment. 15 Ed. 4. 18. If a record be removed out of the exchequer into the exchequer chamber by error, when judgment is given, all shall be remanded into the exchequer, and execution shall be awarded there; but that is by the statute of 31 Ed. 3. c. 12. otherwise it is of other courts.

E And when the record is removed by writ of error into the common pleas or king's bench, then the plaintiff

37 Aff. 17.
For assignment of many errors in law. 38 H.

6. 30. *Note*, That the party assigned error upon an issue, and the court saw the original that it was not good, for it was *ex assignatione*, where it ought to be *ex divisione*, and therefore the court *ex officio* did abate the writ.

in the court baron of *I. S.* and that the same cattle were taken by the bailiff in the same place where, being the fee of the said *I. S.* and delivered to the defendant in execution, and he was not driven to gage deliverance, for he claimed property, and the issue was, that they were not taken and delivered to him in execution; *& alii contra* 38 Ed. 3. 3.

And a like case was thus: *A.* brought a writ of right close in ancient demesne against *B.* of ten acres, and made protestation in nature of an assise, and recovered; and *C.* being the bailiff of the court, took an ox of *B.*'s on five acres parcel of the land recovered (but in fact those five acres were held at common law by virtue of a fine levied before the recovery) and sold the ox to *D.* and *B.* brought a

replevin against *C.* the bailiff, and it was adjudged, 1. That if the whole had been so held by fine at common law, it had been *coram non iudice*, and void. 2. For that part only was ancient demesne, yet till judgment reversed the damages are leviable. 3. That he might well take the beasts by the execution in any place within the manor which is ancient demesne, though the place where he took them is not ancient demesne. 4. That the sale was a good execution, *&c.* 7 H. 4. 28. Yet see the contrary *per Cur'*, 4 H. 6. 17. and 22 Aff. 72. *per Thorpe*, in the case of a recovery in a court baron in debt. *Ergo quære & vide optime Rot. Parl.* 21 Ed. 3. No. 21.

(b) But not the writ original. 24 Ed. 3. 24.

ought to assign his error, before he have a *scire facias* against the defendant *ad audiendum errores*. And if he assign divers things for errors, which the court thinketh to be no errors, he shall not have a *scire facias* upon this assignment. But after errors assigned, and a *scire facias* awarded against the defendant upon that assignment, he shall not assign an error in fact, as to say, that the plaintiff was dead at the time of the judgment, or before the judgment, &c. But he may assign as many errors as do appear in the record, and it shall not be said a double assignment. But he shall assign for error but one error in fact, because this error in fact shall be tried by the county, and the errors in the record shall be tried by the justices. F

And upon a writ of error the record itself (a) shall be removed, and not the transcript of the record; for upon a

(a) *Ibid.* And a *scire facias* lies on such a transcript; also it seems, that judgment shall be given before they remand it, to prevent loss of the king's fine. *Lib. Intr.* 296. m. 16 *Ed.* 3. See 21 *Ed.* 3. *contr'*. See also 22 *Ed.* 3. 6. the reason, *viz.* Because that which is sent into *B. R.* shall not be remanded, and therefore a writ was sent to the treasurer and chamberlains (*of the exchequer*) to send the fine extracted out of the files on a judgment reversed. See 1 *Mar. Dyer* 89. *Varney's case*; for there is no chirographer there, if the fine be affirmed. See 10 *Eliz. Dyer* 274. pl. 44.

See a fine itself removed out of *Oxford*, 50 *Aff.* 9. The plaintiff had judgment, and the defendant brought error and removed the record, the which he let lie, without suing a *scire facias*; the plaintiff prayed execution, and had a *scire facias*, and upon two *nibils* returned execution was awarded, and at the exigent the defendant comes and prays a *scire facias*, and had it, for that he was not named, for *exactus fuit* is upon the *scire facias* to

have execution, and not on the writ of error. 8 *H.* 6. 13.

Note; If two defendants bring several writs of error, and several *scire facias's*, yet they may assign and continue the errors in common. 11 *Ed.* 4. 92. adjudged. But if there be a variance between the record and the writ, there, although a transcript of the record be sent into *B. R.* and a *mittitur* into the rolls of *C. B.* yet the record remains in *C. B.* and there shall be execution granted, as if a writ of error be to send the record of a recovery by *A.* against *B.* and the record of a recovery by *A.* against *C.* is sent, this is without warrant, and the record still remains in *C. B.* 9 *H.* 6. 4. See 24 *Ed.* 3. 24. 43.

Note; Baron and feme acknowledge a deed, which is after inrolled; the baron dies, and the feme brings error to reverse the deed, for that it was inrolled by her being a feme covert, and for that the court could not examine her without a writ: and it was admitted to be good. 21 *Ed.* 3. 43.

transcript of a record a man shall not assign errors, if it be not upon a writ of error sued upon transcript of a fine, there he shall assign errors (b) upon the transcript of the note of the fine; and if the justices do conceive it error, then they shall send for the note of the fine, and shall reverse the same. *Vide post.* 72. D.

G In a writ of error, when the record cometh in court, if the plaintiff all that term do not assign his errors; and although that he do assign his errors, if he do not sue a *scire facias ad audiendum errores* against the defendant, returnable the same term, or the next term; all the matter is discontinued, and the next term he ought to sue a new writ (a) of error out of the chancery, upon that record directed

2 H. 7. 12.

(b) *Of assigning and examining errors.*

In re disseisin the defendant is outlawed and taken, and then brings error of the principal judgment and of the outlawry, and assigns error in the principal, and it was held, 1. That the outlawry shall not be reversed, without making the plaintiff a party by *scire facias*, for the defendant is in execution for him. 7 H. 4. 40. 2. That he might well have a writ of error to reverse both the principal judgment and the outlawry. 11 H. 4. 66. and may assign error in the principal, before he resorts to the outlawry; for by reversing the principal he reverses the outlawry. 11 H. 4. 6. 8 H. 7. 10. 7 H. 6. 44. *contra* 7 H. 4. 40. 3. He may sue to reverse the outlawry without finding sureties for the damages here. For by defeating the outlawry the imprisonment is gone. 7 H. 4. 40. 4. If the party pleads a release of the right to the land, he shall be disabled to reverse the principal, and yet he may assign error in the principal, as in the original, or in the judgment, and thereby reverse the outlawry, although there be no error in that process. 11 H. 4. 6. adjudged.

See 18 H. 6. 18. The defendant in an assize was taken by a *capias pro fine*, and sued a writ of error, and found sureties to sue with effect, and to pay the fine to the king, and to satisfy the party, if judgment was affirmed, and all this was in chancery; and thereupon he had a writ to the justices to deliver him, and to send the record into B. R. and it was so done; and there he assigned errors which were no errors, whereby no *scire facias* issued, and it was moved that a new *capias pro fine* should issue, for that the party had interest in the execution, so that on the said sureties found in chancery, he ought not to be dismissed, and therefore the dismissal was erroneous, for he ought to have had a *habeas corpus*, and removed his body, and thereon to have found sureties to satisfy the party, or to render his body to prison again, if judgment were affirmed.

(a) *Note*; If matter of fact be assigned for error, as that the party's attorney was judge, &c. if the other pleads in *nullo est erratum*, and confesses the matter of fact, and puts in judgment of the court. *Si error*, &c. as 3 Ed. 6. *Dyer* 65. He may demur thereto, and see *Dyer* 104. 2

directed to the justices before whom the record is removed, to proceed upon the record *quæ coram vobis residet*.

35 H. 6. 12.
If the writ of error hath longer day of return than it ought to have, the justices of the common pleas may shorten the day.

The form to assign errors is to put a bill into the court, and to say in the bill, *in hoc erratum est*, &c. and to shew in certain in what things; and *in hoc erratum est*, and shew in certain another thing; and so of the rest in which he will assign the errors. But to say, *in omnibus erratum est*, is not good, because of the incertainty.

demurrer on the errors assigned. And Note; The defendant may assign for error, that his attorney had no warrant, although he acted for his advantage. 7 H. 4. 16. 11 H. 4. 44. & 88.

(a) See error on a judgment in chancery on a *scire facias*, upon a recognizance there, and reversed in B. R. 14 Eliz. Dyer 315. And see error in chancery on a judgment given in chancery. 42 Aff. 22.

Note; In darrein presentment the parties demur, and adjudged against the defendant, for that he had brought a writ of error before the damages were taxed; for the assise in such case is to inquire into the point of damages, and yet it was adjudged, that a writ of error lies, for that judgment is rendered upon the principal, (*i. e.* the right of presentation.)

So where damages are to be taxed in a writ of ayel. 17 Ed. 3. 5. 21. 23 Aff. 8.

Note; Such court as may hold plea above forty shillings, is a court of record, and yet may be by prescription. 9 H. 7. 11. 45 Ed. 3. 2 a. 18 H. 6. Prescription 45. per Cur', 19 H. 6. 79, 80. Where one prescribes to hold plea by plaint in his court of all debts. 4 Ed. 3. 36. He that has consuance of pleas, has a court of record. 9 H. 6. 58, 59.

Note; If the plaintiff be nonsuit, &c. the court ought not to examine the errors. 21 Ed. 4. 44. But if the defendant pleads in bar of error, &c.

as by release, &c. yet if it be found against the defendant, they shall examine the errors. 21 Ed. 3. 54. b. 8 Ed. 4. 8. And if it be found for him, the judgment shall not be affirmed or reversed, but the plaintiff shall be barred. 9 H. 6. 48, 49. a.

Note; An infant brought error of a fine levied by him to A. for life, remainder to B. he cannot reverse it without warning B. 21 Ed. 3. 56. a. Also, where A. recovered against B. and enfeoffed C. and died, B. brought error, and it was held, 1st. That the judgment shall not be reversed without making the heir of A. a party by garnishment, either as to the land or the persons. 2dly. That he might have a *scire facias* against the heir and tertenants in the same writ without naming the tertenants' names; or, 3dly. He might have a *scire facias* against the heir *ad audiend'* errores, and afterwards a *scire facias* against the tertenants, to have execution. 8 H. 4. 17, &c. Or if he has no heir, a *scire facias* lies against the tertenants. See 8 H. 6. 35. b. A. being guardian of B. recovers in a *quare impedit*, and dies, the defendant brings error, and after a *scire facias* by C. the heir of A. against B. and the incumbent, not naming A.'s executor, yet adjudged good: for A. was guardian by reason of the feigniory. See a *scire facias* against a defendant in the same writ of error. 34 Aff. 7 or 17. 8 H. 6. 35. b.

And

A And in a writ of error he ought to assign his error in proper person, and not by attorney, where he is in execu-

5 H. 7. 3.
8 H. 7. 10.
7 H. 7. 4.
21 H. 6. 43.

B tion by force of the judgment. And in a writ of error upon judgment given in the common pleas, the plaintiff cannot assign for error, that the justices of the common pleas did not give that judgment, but the clerks of their own heads; neither can he assign for error, that the jurors gave their verdict for the defendant, and that the justices entered it for the plaintiff, and gave judgment for him, because that this assignment is contrary to that which the court doth as judges, &c.

[21]

C And if a man be vouched, and entereth into warranty, and loseth, he may have a writ of error, and assign the (a) errors which happened betwixt the demandant and the tenant, or betwixt the demandant and the vouchee. And so he in the reversion who prayeth to be received upon the default of the tenant for life, or for his faint pleading, if he be received, and pleadeth, and loseth, he shall have a writ of error, and assign the error betwixt the demandant and (b) the tenant, or between the demandant and him who prayeth to be received. And if tenant for life loseth by default, he in the reversion shall have a writ of error, although he were not received, nor prayed to be received, and shall assign for error the matter which was betwixt the demandant and the tenant who lost by default. 8 H. 4. 55, 56.

3 Co. 40.
50 Ed. 3. Aff.
The reversion was granted to one pendent the writ against the lessee for life; or if the tenant in fee pray in aid of a stranger, *quære*; for in these cases he in the reversion shall have error.
50 Ed. 3. 5.
But *quære* if the judgment shall be reversed, and that execution shall be awarded, or shall cease during the life of the husband.

D A man shall assign an error in law, as the case is: as if the husband and wife levy a fine of the lands of the wife unto a stranger, the wife being within age, they shall

(a) Note; He who is only tenant in law may have error, as if the tenant aliens pending the writ, and afterwards judgment is given against him. 21 Ed. 3. 53, 54. F. Error 4. 12 Aff. 41. He may bring error, and if he reverses the judgment, the feoffee may enter upon him.

So he in reversion or remainder on an estate tail may assign, &c. Dyer 188. And thereupon the tenant shall be restored. 1 H. 4. 5.

See 4 Eliz. Dyer 241. 21 H. 6. 29. 15 Ed. 3. 1. Error 72. 32 Ed. 3. Error 73. Post. 108. A.

(b) Note also; The vouchee may assign error between the demandant and tenant, and so of tenant *per Resceit*. 8 H. 4. 5. 8 H. 4. 3. But the tenant (himself) shall not have error, because he is out of court. *Quære*, 17 Ed. 2. Recovery in value 32.

have a writ of error during the nonage of the wife, and shall assign that for error, and that is an error in law of the Court.

20 Aff. 2. c. 3.
ac. 21 Ed. 3.
Fitz. Error 4.
7 H. 6. 39.
Matter in fait
must be pleaded,
and shall not be
assigned for error.
8 Ed. 4. 19.
By Pigot and
Choke, in joint
tenancy, general
tenancy, mesno-
mer, taking of
husband pendent
the writ, and the
like, which
prove the writ
abatable; there
if the party plead
other matter,
and admit the writ,
he shall not have error:
abated.

8 H. 5. 2.
5 Co. 40. a.
8 Co. 59. a.
40 Ed. 3. 15.
V. 21 E. 3. 46.
Br. Error 65.
and Trial 35.

Also in a writ of *entrie sur disseisin*, if the original writ want these words in the writ, (*a*) which he claims to be his right and inheritance, if the tenant admit of the writ, and plead to the action, and loseth, he shall not assign this fault in the writ, because he hath admitted the writ to be good by his plea. And so in a writ of *detinue of charters* concerning (*b*) certain lands, if the plaintiff in his count do not declare the certainty of the land in the count, if the defendant do admit the count good, and pleadeth unto the action, and loseth by judgment given in a writ of error sued by him; he shall not assign for error the fault in the count; because he hath admitted the same to be good by his plea. *Tamen quære.*

(*c*) And a man shall not assign for error a thing which is for his advantage: as to say and assign for error that he had day, and that the day was for longer time than the common day; and so he shall not assign for error that he was not effoined, where he ought not to be effoined, or had aid granted unto him, where he ought not to have had aid; because these things are for his advantage. *Post.* 22. D.

(*a*) See 21 Ed. 3. 54. F. Error 4. If an avowry be quashable, for that it is returned by the bailiff of the franchise, where it should be recited by the sheriff, or if the writ be abatable and not challenged; this shall not be assigned for error; *contra*, if it be abatable *per Officium Curiae*. 3 H. 4. 7.

(*b*) See a judgment on an indictment of conspiracy, where the defendant had pleaded not guilty, reversed, for that the place where, and the day of conspiracy, were not shewn. 24 Ed. 3. 75.

(*c*) An attorney appears for one

without warrant; it is error. 7 H. 4. 16. At the grand cape one appears as attorney for the tenant, and wages his law of non-summons, and at the day makes default, the tenant brings error, and assigns that the attorney had no warrant; and by the better opinion judgment was reversed. For the continuance was taken without the party, and the judgment could not be good on the second default; for it is but a judgment by default, &c. and there ought to have been two defaults recorded against the tenant. See 8 H. 5. 2. 14 Ed. 3. Error 6. 19 H. 6. 12.

(*d*) If

G (d) If false judgment be given before the justices of the bishop of *Durham* in the county palatine, the party grieved shall have a writ of error there before the same bishop. *M. 14 Ed. 3.* And if he give false judgment, then the writ of error shall be sued in the common pleas, or in the king's bench. *22 Ed. 3. 3. 23 Ed. 3. 22. 2 R. 3. 2. 7 H. 6. 28.*

19 H. 6. 12.
False judgment
in Wales before
justices, errors
there shall be re-
versed in B. R.
if there be jus-
tices there; but
by Fortescue it
shall be reversed
in parliament.
19 H. 6. 12.

Error in county palatine shall be reversed in B. R. *21 H. 7. 33. per Fineux*, erroneous judgment in county palatine shall be reversed there by commission. *37 H. 6. 13.* Error in chancery reversed in parliament. But see *14 Eliz. Dyer 315.* That error upon a *scire facias* upon a recognizance was reversed in B. R. which seemeth contrary to *37 H. 6. 13.*

H And if a false judgment be given for the king in any suit or action, the (a) party grieved shall have a writ of error, and assign his errors, without suing forth any *scire facias* against the king *ad audiendum errores*, because that the king is always present in court; and that is the cause of the form of entries of suits for the king is such: Christopher Hales, attorney of the lord the king, who prosecutes for the lord the king, &c. comes here into court, &c. and not, the lord the king by C. H. his attorney, comes here into court, because that the king is always present in court.

7 H. 4. 37.
1 H. 7. 13.
2 R. 3. 2.
25 Ed. 4. 7.

1 H. 7. 13.
It is said, if any
be to reverse out-
lawry in felony,

when he cometh in upon the indictment, he shall assign his error before he prosecuteth his writ of error.

(d) See the form of a reversal of a judgment in *Chester. Lib. Intr. 290. a. b. Reg. 17. 6 H. 4. 9. 34 H. 6. 42. b. Dyer 320, 321 and 345.* Note; Error lies not on a judgment reversed in the Cinque Ports, but *coram custode quinque portuum.* See *Dyer 376.* Also a judgment in *Durham* shall not be reversed in C. B. but in B. R. *Pasc. 29 El. 3. Hughes's Abr. 207. Morton's Case. See 14 Ed. 3. F. Error 6. and 8 Eliz. Dyer 250.* (a) Note; He ought first to sue by petition to the king. See where a writ went to the justices to examine the errors, *hoc non obstante. 24 Ed. 3. 35, 36. Hill, 29 Eliz. 3. Hughes 308.*

Vide 4 Ed. 4. 41. 24 Ed. 3. 34. 7 H. 6. 28. Hidebrad's Case. 19 H. 6. 2. 15 Ed. 4. 78. 37 H. 6. 17. *per* three justices. If a man be utlage notwithstanding a *superfedeas*, and appear and plead in the common pleas, the utlary shall be reversed in the same place, although it be in another term; but *contra*, if it be in another term, but defendant doth not appear and plead.

(b) Error in the king's bench I in the process, where it is the default of the clerks, shall be reversed in the same court by a writ of error sued by the party before the same justices: but not without suing of a writ of error, although it be the same term.

But in the common pleas, after judgment given the same term the justices may reverse their own judgment upon error in the process, or for default of the clerks, without any writ of error sued forth; but in another term the party ought to sue forth a writ of error thereupon returnable into the king's bench. But of an error in law which is the default of the justices, the same court cannot reverse the judgment by a writ of error, nor without a writ of error, but this error ought to

(b) See the form of a writ of error in parliament. *Dyer* 375.

As if before the *quintus exactus* the party appears, and has a *superfedeas* of record, be it in term or in the vacation, though it is not shewn to the sheriff at the day of the exigent or *capias utlagatum*, he may avoid the outlawry the same term in C. B. *contra* in B. R. See 4 H. 4. 1. a. b. 4 Ed. 4. 42. 10 H. 7. 16. 9 H. 6. 12. 44. a. b. And if he comes in at the return of the exigent, he may reverse it in B. R. without a writ of error; *per Westbury*; and see there if judgment be given; where there is a default in awarding the process, or in the return, it is ill. For there the *tales* was returned without being awarded, and on a writ of error brought, three points were agreed, *viz.* 1. That though on an erroneous judgment given on *an original* in B. R. Error does not lie there, except for error in process by default of the clerk, or in the return by default of the sheriff; yet there, *i. e.*

in C. B. a writ of error shall be granted for error, either in the record, or in the process, or *in redditione judicii*. 2. That in the same term the roll is not recorded, but is only in the breast or remembrance of the judges, and therefore in the same term they may amend by the common law, even after judgment; yea, though a writ of error be brought. (See *Tutchin's Case*, 6 Mod.) And in C. B. where, in the principal case, a *tales* was in fact awarded, but not entered on the roll, it was amended after a writ of error brought, it being in the same term. 7 H. 6. 28. See 2 R. 3. 21. and 8 H. 6. 37.

See *Dyer* 195. An outlawry after judgment reversed, because although a *capias* lay on the writ, yet the process for it was not till after the judgment discontinued. And *Note*; If a plea be discontinued, and the plaintiff be afterwards nonsuit, yet he shall have error or false judgment, as his case is. 22 Ed. 3. 2. a.

be

be redressed in another court before other justices by a writ of error.

K And he which confesseth the demandant's action shall have a writ of error to reverse that judgment, against his confession upon erroneous judgment given.

L In plea of land against the tenant, and the tenant dieth, he (a) who is heir of the tenant to that land shall have a writ of error, and not he who is his heir at the common law: as in *Borough-English*, if the tenant lose the land by erroneous judgment, the youngest son shall have the writ of error. (b) And so he which is heir unto the special tail shall have the writ of error, if the land be lost by erroneous judgment: the tenant may have one writ of error, and the vouchee another writ of error upon the same judgment; and so the tenant, and the vouchee by rescuit, and all depending at one time. And an executor or administrator shall have a writ of error upon a judgment given against the testator for debt or damages. And so the heir shall have a writ of error to reverse an (c) outlawry of felony pronounced against his father, to restore

Yet note;

9 H. 7. 24. is that the heir at the common law shall have it.

3 H. 4. 19. the daughter to the tail brought error, although a son were heir at common law.

Vide 1 Ma.

Dyer 89, 90.

20 Ed. 3.

Fitz. Error 2.

11 H. 4. 65.

(a) See accordingly 3 H. 4. 19. And that the writ shall be brought generally as heir, and that on exception taken thereto, that he is not heir, he shall shew the special matter. See 9 H. 7. 24. b. *contra*, viz. A. and B. his wife, are tenants in tail special, and to their heirs; they have issue C. A. dies, B. and C. levy a fine, C. dies without issue, D. as heir to C. brings error, &c. 1. For that it does not appear that C. was heir to the wife, &c. 2. That he ought to make him heir to A. for he may be only of the half-blood to C. And see *Vernay's Case* in *Dyer* 89. In a suit brought as cousin and heir, he shews how he is heir.

(b) See 8 H. 4. 3. accordant; and if judgment be reversed against the one, it shall be reversed against both. See 2 H. 7. 10. and *supra* the notes fol. 21. C.

(c) But he ought to sue a *scire facias*, that the lord may seize for the

escheat. 8 H. 6. 2. pl. 9 ult. *Lib. Intr.* 308. b.

Note; Error in the principal judgment shall reverse the accessory, and *è contra*. If a judgment be of record against a parson in annuity, in a *scire facias* against the successor, he shall not plead in bar of execution, that the judgment was erroneous, and if he does so, execution shall be awarded; and if he after brings error on the judgment, if on the *scire facias* he assigns error in the principal judgment; this is not good, although the whole record of the judgment be recited in the *scire facias*; and therefore if the judgment be affirmed on the *scire facias*, yet he may have error on the principal, and thereby reverse the judgment on the *scire facias*, and he shall be restored to all that he lost on the *scire facias*: adjudged 11 H. 4. 47. See 9 H. 6. 13. accordant.

the

the blood betwixt him and the father. And if a man plead in any action, and the justices will not allow thereof, and the party makes his bill upon it, and prayeth, that the justices will seal this bill of his (*d*) exceptions or plea; and if they do not according as is contained in the statute of *West. 2. cap. 3.* the party grieved shall have a writ of error, and may assign error upon that bill so sealed, and also in the record, or in one of them, at his pleasure: But this bill ought to be sealed by the justices before judgment given by them, and not after, as it appeareth *An. 11 H. 4. 52. 65. 92.*

Vide 3 H. 3.
the last case.
Vide devant
21. L. M. N.
16 Ed. 3.
Error 69.
12 H. 8. 8.
ante M.

The successor of an abbot, prior or parson, or such **A** bodies corporate, shall have a writ of error of a judgment given against their predecessor; of all things which touch the succession or corporation. But if a man recover against a parson or a bishop, debt or damages by judgment or action personal, their executors shall have the writ of error upon that judgment, and not their successors, because that matter doth not concern the corporation.

18 Ed. 3. 25.
17 Aff. 24.
Error 71. yet
the lord by es-
cheat shall not

If a man sue forth execution erroneously against the re- **B** cognizor upon a recognizance, the feoffee of the recognizor shall have a writ of error. (*a*) If a man purchase

have error. 15 Aff. 8. and so 9 Ed. 4. 14. that a stranger shall not have error. 6 Ed. 3. 7. Fitz. Error 78. 21 H. 7. 13. 5 Ed. 2. Error 89. no Error shall be brought here but upon default of justice of the king's bench in Ireland. And note that it is said, that there is no original here, but the same remains there; and so is 37 Aff. 5. Fitz. Aff. 328.

his

(*d*) See 11 H. 4. 52. *per Hulf.* the bill of exceptions is no part of the record, before that it be acknowledged, (*i. e.* entered, &c.) And 11 H. 4. 65. By good opinion, one of the justices may deliver the bill into court without a *scire facias*; yet in that case a *scire facias* issued, and the justices came and acknowledged their seals; and it was held, that this acknowledgment of the justices might be made long time after the writ of error brought, and after the *scire facias* awarded, and that no new *scire facias* shall issue; for it is now become parcel of the record *ab initio*, as

in the case of diminution alledged after a *scire facias*. The defendant shall not alledge diminution in the bill of exceptions, but ought to have shewn his case when the justices came to set their seals. See 1 H. 4. 92.

See also 11 H. 4. 67. and *note*, 11 H. 4. 92. *per Gascoign*, and *Hulf.* it was held clearly, that the bill may be sealed after the record removed by writ of error.

(*a*) *Post.* 104. G. See 24 Ed. 3. 42, 43. accordant. But he shall not be restored to his chattels against the king; and *note*, the error there was a discontinuance of the process. See

3 H.

- his pardon of an outlawry, yet he may have a writ of error to reverse the outlawry. *H. 18 Ed. 3.* (b) But if a man
- C** do disclaim in a *præcipe quod reddat* of land, and the demandant doth recover, the tenant shall not have a writ of error against his own disclaimer: but if he plead *non-tenure*, and the same be found against him, for which the demandant recovereth, the tenant shall have a writ of error. *H. 6 Ed. 3.* A man condemned shall not assign error in the process; but in the original writ he may.
- D** It is no error to suffer one to make attorney in an action in which he ought not to make any attorney. *7 H. 6. 21.*
- E** (c) Upon false judgment given in the common pleas in *Ireland* the writ of error ought to be sued there; and returnable in the king's bench in *Ireland*; but upon a judgment given in the king's bench in *Ireland*, the writ of error shall be sued and returned in the king's bench in *England*.
- F** (a) When the record cometh into court by a writ of error, the plaintiff shall assign his error, and shall have a *scire facias* before the record shall be entered; for the same shall not be entered before the parties have day by the *scire facias*.
- G** And the process in this writ is *alias* and *pluries*, and upon that attachment shall be awarded against the judge, who ought to return the record to whom the writ was

3 *H. 4. 10.* accordant. Yet it cannot be alledged at the *scire facias*, without the charter (or writ) returned, and the plaintiff has counted. *Vide post. 104. G.*

(b) See 3 *H. 4. 20.* 19 *Ed. 3.* Error 75. 6 *Ed. 3. 7.* 36 *Ed. 3.* Error 6 and 82.

(c) Of errors to reverse judgment in *Ireland*, see *Showers's Parliament Cases.*

And to reverse a judgment of reversal given in the king's bench in *Ireland*, see 34 *Aff. 7.*

(a) Here *Note*; If the record be removed for error, but the party does not assign his errors, he who recovers may have a *scire facias* for execution;

and if he has execution awarded by default yet the other may come and assign errors in the parliament, and then have a *scire facias ad audiend' errores.* 9 *H. 6. 13.* See accordant 17 *Ed. 3. 21.*

Note; A *scire facias ad audiend' errores* shall issue against the tertenant and heir of him who is party to the record; but the heir is plaintiff, and by his death the *scire facias* shall abate. *Note*; The plaintiff may elect a *scire facias* against the heir only, and after reversal to him take another *scire facias* against the tertenant *ad audiend' errores*, or he may take it against both together. 47 *Aff. 4.*

directed:

directed: and the *pluries* may be returned into the common pleas, or into the (b) chancery, if the *pluries* issueth to the justices of the common pleas to remove the record; and if the writ issueth to another base court, the *pluries* ought to be returned into the chancery, or into the same court where it is made returnable. And if it be returned into the chancery with the record, the chancellor himself with his own hands may put the record into the common pleas without any writ of *mittimus* thereunto, and that as well as if he had sent a *mittimus* with the record (c).

(b) The chancellor may send the record into C. B. 17 Ed. 3. 21. 5 H. 5. 1. in a *certiorari*. See 9 H. 6. 4. that part of a record may be delivered to the justices of B. R. by the chief justice without a writ, when the other part was delivered by writ.

(c) What record shall be removed by writ of error?

Note; If judgment be given in a franchise, or inferior court by writ of error, the original shall be removed; but if it be given in C. B. the original shall not be removed without a special writ (for its removal). 34 Aff. 7. Yet see an original not removed in case of error brought on a judgment in Oxon. in a writ of right, for that if the judgment were reversed, the party might proceed on the same original in Oxon. or he might pray a writ to remove the original into B. R. and so proceed thereon in B. R. 37 Aff. 5. 17. fol. 22. See *Danvers's General Abr. Tit. Error*.

Where a writ of error shall be a *superfedeas*, &c. If the party be in custody on a *capias ad computandum*, he shall not be taken out of it by a writ of error. 21 H. 6. 26.

Note; 1. If after judgment execution be awarded, and error brought, and then the party is taken, he is well taken, for a *superfedeas* ought to have issued (upon the writ of error) out of C. B. directed to the sheriff;

for the writ of error is no *superfedeas* as to the sheriff, but if the party removes the record, he may find sureties, and have a *superfedeas* (directed to the sheriff) out of B. R. 20 H. 6. 4. 7 H. 6. 42. 44.

But *Note*; If no execution be awarded; 1. The writ of error is a *superfedeas* to the award of execution; but if the party be nonsuit, and brings another writ of error, this is no *superfedeas* to the award of execution, nor shall any *superfedeas* be directed to the sheriff on this second writ; and yet if he sends the record into the king's bench on this second writ, he shall have a *superfedeas* there on sureties found. 20 H. 6. 4. 19 H. 6. 8. But if the writ of error be discontinued by the not coming of the justices, &c. the second writ is superseded. 6 H. 7. 16. But if a judgment be given in a *quare impedit*, and the party sues out of (or on) the rolls a *quare non admittit*, and pending this the other brings a writ of error, the record shall be sent notwithstanding this writ; and when the record is sent, the *quare non admittit* being a judicial writ, and all the proceedings thereon are determined; for by reversal of the first judgment, all that depends thereon is reversed; and the same law is in a *scire facias* to reverse a judgment. See 26 Ed. 3. 75. and 2 H. 6. 4. See also stat. 3 Jac. 1. c. 8.

A *scire*

Error in London.

H NOTE, that if any erroneous judgment be given in the courts before the sheriffs of *London*, the party grieved shall have a writ of error out of the chancery directed unto the sheriffs, to bring that record before the mayor and aldermen in the (a) hustings of *London*, which hustings is a court holden before the mayor, &c. And there the record shall be examined: and if there be error, they shall reverse the record there by the custom of the said city. And if the sheriff, after the record is removed before the mayor, &c. in the hustings, will award execution upon the record against the party, the party against whom the execution is awarded shall have a special writ out of the chancery directed unto the sheriffs, that they take sufficient sureties of the party to satisfy the king, and also the party, of that which appertaineth unto them, if the judgment be affirmed, and that they surcease to do execution; and if they have taken the party in execution, that they deliver him out of prison. And the form of the writ is such:

Nat. Brev. 37.
Ante 21.
A feme covert was received in the common pleas to acknowledge a deed inrolled, where they have not power to examine her without a writ, *quare* if error; for it is not adjudged, if it be error or not. *Quare* the usage at this day. 30 of an infant. 21 Ed. 3. 29. Br. Error 62. Vide 32 H. 8. That a statute nor deed inrolled shall not be taken by the common law of an infant or feme covert. *Contra* by the custom of London, per 29 H. 8. 23. and 7 Ed. 4. 5. Lis.

I *The king to the mayor and sheriffs of London, greeting: It is shewn unto us on the behalf of R. &c. that whereas according to the custom in the city aforesaid, in case when any person,*

A *scire facias* issued upon a fine, the tenant made default, and at the day given a writ of error was brought on the fine; no judgment shall be given on the *scire facias*, but the plaintiff may have debt on a recovery, although the record be removed by error, either pending or before the writ of debt brought; for the writ of error is as a new original.

On a *devastavit* on a judgment in debt against executors, a *scire facias* issued, and on issue found for the plaintiff, the defendant had a writ of error on the original recovery; yet

judgment shall be given in the *scire facias*, that execution shall be awarded, *sed cesset executio* until the record affirmed. 10 H. 6. 6. per Cur'.

Note; This *scire facias* is in nature of a new original, as if one recovers in assise, and after brings a re-disseisin, and afterwards error is sued of the judgment given in the assise; yet the sheriff shall go to the judgment in the re-disseisin, because it is in nature of a new original. See 9 H. 5. 13.

(a) Vide Rot. Parl. 8 Ed. 2. m. 17. the case of *Job. Bonaventure*.

either

either plaintiff or defendant, complains that in a plaint which was in our court before the sheriffs of the city aforesaid, any errors have intervened, and would remove the record and process of those plaints for cause of error intervening into the hustings of the city aforesaid, to have those errors corrected, the sheriffs of the city ought to supersede the execution of the former judgment before them given, pending the records and process of those plaints indiscussed in the hustings; and we lately, at the prosecution of the afore-mentioned R. suggesting, having been informed that manifest error had intervened in the record and process of a plaint which was before you the aforesaid sheriffs in our court of the city aforesaid by our writ, between A. and the aforesaid R. for that, that the said R. &c. commanded you, that you should cause the record and process thereof to come before you in the hustings aforesaid, to correct the error, if any should be; nevertheless you the sheriffs (pending the said plaint of error indiscussed in the hustings aforesaid) unjustly cause execution of the former judgment to be done, to the no small expence and grievance of the said R. Therefore we command you, that if it so be, that the same R. shall find you sufficient security as well to satisfy to us of that which belongs to us in this behalf, as to the aforesaid A. of the arrearages and damages adjudged to him in this behalf, if the first judgment shall happen to be affirmed, and further to do and receive that which our court shall consider in this behalf; then supersede the doing execution of the former judgment pending the plaint of error above-mentioned in the hustings aforesaid. And if the said R. be taken and detained in our prison by occasion of that judgment, then that you in the mean time cause him the said R. to be delivered out of the prison by the security aforesaid, if he be detained in the same upon the occasion aforesaid, and upon no other, that he may be able to prosecute his said plaint of error. *Witness, &c.*

[23]

And it appeareth by this writ, that a man shall have an A
action against any person in London, by original out of the
chancery directed unto the sheriffs of London, and that they
shall hold plea thereof. And a man shall have the like B
writ of error upon a judgment given in London before the
sheriffs by plaint sued there before them, without any writ
original sued, &c. And the writ of error shall be directed
unto

unto the mayor, and also to the sheriffs, although that the judgment be given in the sheriffs court before them, to remove the record into the hustings to reverse it there, if, &c. And the form of the writ shall be thus:

C *The king to the mayor and sheriffs of London, greeting, &c. Because in the record and process, and also in the giving of judgment of the plaint which was in our court of the city aforesaid before you the aforesaid sheriffs without our writ according to the custom of the same city, between A. and R. of a certain trespass to the same A. committed by the aforesaid R. as it is said, manifest error hath intervened, to the great damage of him the said R. as we have received from his complaint: we being willing that the error be corrected in due manner (if any shall be) and full and speedy justice done to the party aforesaid in this matter, command you, that if judgment thereof be given, then that you cause the record and process of the plaint aforesaid to come before you in our next hustings of the same city, and the same to be recited and diligently examined in the presence of the aforesaid parties to be warned hereupon by you the said sheriffs to be present, if they will, and the error (if any shall be) in this matter to be corrected in due manner, and full and speedy justice to be done thereupon to the parties aforesaid, as of right and according to the custom of the city aforesaid ought to be done. Witnesses, &c.*

D And the writ of *supersedeas* unto the sheriff, to cease to do execution pendent the writ of error, may be made and contained in the same writ of error which is directed unto the mayor and sheriffs to remove the record into the hustings.

E And if erroneous judgment be given in the hustings in London before the mayor and the sheriffs there, then the party who will sue to reverse the judgment shall come into the chancery, and there sue a commission directed to persons to examine the record, and process, and the errors, and thereupon to do right. And the commission shall be thus:

34 H. 6. 42.
When error is
sued upon a judg-
ment before the
mayor, it shall be
at S. Martin's,
and then the
mayor and alder-
men shall have
forty days to be
advised of their
records, and the

recorder shall record the same *ore tenus*.

(a) *The king to his beloved, &c. R. and S. greeting: We have received information on the behalf of B. that in the record and process, and in the giving of judgment of the plaint which was before the mayor and sheriffs of London in our hustings there without our writ, between C. and the aforesaid B. of a certain trespass, &c. committed, as it is said, manifest error hath intervened: We, in defect of the same mayor and sheriffs, being willing that error be in due manner corrected (if any shall be) and that fulness of justice be done thereupon to the parties, do assign you our justices, together with those whom we have associated with you, to examine the aforesaid record and process, and to correct the error (if any shall happen to be found in them, or in the giving of judgment of the plaint aforesaid) and to do full and speedy justice thereupon to the parties, according to the custom of the city aforesaid; and therefore we command you, that at a certain day which you shall prefix for this purpose, you go to Saint Martin's le Grand, London, and that in defect of the aforesaid mayor and sheriff you do the things premised to be done in form aforesaid, &c. according to the law and custom of our realm, and of the city aforesaid; saving, &c. We command, &c. the same mayor and sheriffs, that at a certain day whereof you shall give them notice, they cause the record and process of the plaint aforesaid, with all things touching them, and the parties aforesaid, to come before you at the place aforesaid. In testimony whereof, &c. Witnesses, &c.*

And upon this commission the justices shall award a F precept unto the mayor and sheriffs, to send the record and process before them at a certain day, and to warn the parties to be before the justices at the same day, &c. And the king shall send another writ unto the mayor and sheriffs, to have the record and process before the said justices at the day assigned by the justices by their precept made unto the mayor and sheriffs. And upon this commission the king may make association, and another writ *si non omnes* directed unto the justices to proceed, although that some of them do not come, as he shall do in an assise, or in oyer and terminer, &c.

(a) See the *Parliament Roll*, 22 Ed. 1. m. 9. dorso.

G And a man shall have a commission to examine the errors, and judgment given in the hustings in the time of another king, and in the time of another mayor and other sheriffs; and the form of the commission is such:

The king to his beloved, &c. Because we have received information on the behalf of B. that in the record and process, &c. (as above, until) do assign you, three or two of you, our justices, to supervise and examine the record and process of the plaint aforesaid, in the presence of the now mayor and sheriffs of the city aforesaid, to be warned hereupon by you to be present, if they will, at the church of Saint Martin le Grand, London, &c. (as in the commission next above, until) and therefore we command you, that at a certain day which you shall prefix for this purpose, you go to the said church of Saint Martin le Grand, London, and do and explain all and singular the things premised to be done in form aforesaid, &c. according to the law and custom of the city aforesaid; saving, &c. We also command the same now mayor and sheriffs, that at a certain day whereof, &c. you shall give them notice, they cause the record and process of the plaint aforesaid, with all things remaining in their power touching the same, as it is said, to come before you, &c. at the place aforesaid; and we command the aforesaid sheriffs, that they give notice to the aforesaid B. that he may be then there to hear the error, if any be in the record and process aforesaid, &c. (as above in the premisses). Witness, &c.

[24]

And upon this commission the king shall send another writ unto the mayor and sheriffs of London, to send the record and process before the said justices, &c. And the writ in the beginning thereof shall rehearse the effect of the record and process, and also it shall rehearse the commission which he hath made to be directed unto certain justices, to examine, &c. and to do justice thereupon: and then he shall say in the end of the writ, *And therefore we command you, that at a certain day, of which the same R. F. and S. or two of them, shall give you notice, you cause the record and process of the plaint aforesaid, with all things touching the same which remain in your power, as it is said, to come before them, or two of them, at the place aforesaid; and do you the aforesaid sheriffs give notice to the aforesaid A.*

that he may be then there to hear the error (if any shall happen to intervene in the record and process aforesaid, or in the giving judgment of the plaint aforesaid) and further to do and receive that which our court shall consider in this behalf: And have, &c.

And if a man hath judgment given for him in London **A** before the sheriffs in their courts, or before the mayor and sheriffs in the hustings of London, and the defendant, to delay the execution of the judgment, sueth a writ of error to remove the record before the mayor, &c. and after the party defendant who sued that writ of error, will by subtil means convey his goods out of the city, or otherwise waste them, to the intent that the plainant may not have execution of his goods; then the plainant who had judgment to recover shall have a special writ directed unto the mayor and sheriffs, that they provide that the goods amounting unto the value of what is recovered, be safely kept to satisfy the plaintiff, if the judgment be affirmed for him; so that execution may be done of the first judgment upon the same goods.

And if judgment be given before the sheriffs of London **B** for the plaintiff, and the defendant sueth a writ of error, and removeth the same before the mayor and sheriffs in the hustings, and when he hath removed it by a writ of error, if he will proceed no further upon the writ, &c. then the plainant who recovered shall have a special writ unto the mayor and sheriffs, that they proceed unto the examination of the errors, and to do execution, if the judgment be affirmed. And upon that writ he shall have an *alias* and a *pluries*, *vel causam nobis significes* in the *pluries*, if he will not proceed, &c. And this writ was devised by *Parning*, then Lord Chancellor, and by him diligently examined, as it appeareth by the register.

Ant. 22 E.

And if false judgment be given in Ireland, the party **C** may sue a writ of error in the king's bench in England; and the writ shall be such:

The king to his beloved and faithful A. his justice of Ireland, greeting: Because in the record and process, &c. error, &c. to the great damage of him the said B. as we have been informed by his grievous complaint: We, &c. that you send to us the
record

record and proceſs of the plaint aforeſaid, with all things touching them, under your ſeal diſtinctly and openly, and this writ, ſo that we may have them (ſuch a day), &c. that we inſpecting the record and proceſs aforeſaid may further cauſe to be thereupon done that which of right ought to be done. And do you give notice to the aforeſaid S. that he be then there to proceed in the plaint aforeſaid, and to do and receive that which our court ſhall conſider in the premiſſes. Witneſs, &c.

Error.

D **T**HE king to his beloved and faithful I. of T. greeting:
 Because in the record and proceſs, and in the giving of judgment of the plaint which was before you and your companions our juſtices of the bench, by our writ, between A. and B. of a record and proceſs of an aſſiſe of novel diſſeiſin, which was ſummoned between them, and taken at S. before our beloved and faithful I. of I. and his companions juſtices, aſſigned, &c. concerning tenements in W. which record and proceſs we indeed for certain cauſes cauſed to come before you, manifeſt error hath intervened, to the great damage of him the ſaid A. as we have been informed by his grievous complaint: we being willing that the error (if any ſhall be) in this behalf be corrected in due manner, and that juſtice be done thereupon to the parties aforeſaid, as it ought, do command you, that if (a)

(a) So that if the teſte of a writ of error be before the judgment, it is no *ſuperſedeas*. 22 H. 6. 6, 7.

See a writ of error returnable in chancery, and the record ſent thence by *mittimus* into B. R. 50 Aff. 4.

Note; Error on a judgment in aſſiſe does not lie before the juſtices of C. B. For they have no power to write to them. *Dyer* 250. *per Cur'*.

See *Mag. Char. c. 11. Communia placita non ſequantur curiam noſtram ſed teneantur in aliquo certo loco.*—Here we may note, That although common pleas could not be held immediately in B. R. yet where there was a defect

(of power) in the court where, by law, they ought to be originally held, they might be held in B. R.

As if a record be brought (into B. R.) out of the common pleas by writ of error, there they may hold plea thereof to the end of the ſuit. So if a plea on a writ of right be removed out of the county court by *Pone* into B. R. And ſo it is, if on a writ of meſne, replevin, or *nativo habendo*, a *ſicut pluries* be awarded returnable in B. R. See 11 H. 4. 49. *per Hankford & Gaicoigne*; and ſee F. N. B. 3. 10 H.

judgment thereof be given, then that you send to us as well the record and process of the plaint aforesaid so had before yourselves, as also the record and process of the assise aforesaid sent before you, with all things touching them, under your seal, &c. so that we may have them, &c. that having inspected, &c.

And this writ of error lieth where the assise passeth in E the county before the justices of assise, and afterwards it is removed into the common pleas, and there is judgment given: now the party may sue this writ of error, if there be any error in the matter; and upon that he may have an *alias* and a *pluries*, if the justices will not rectify the record, &c.

And if the justices of that bench, or other justices, A upon the writ of error will not certify all the record, then
[25] the party who sueth the writ of error may alledge (a) dimi-

(a) It is a general rule, That after *in nullo erratum* pleaded by the defendant, no diminution can be alledged: So is 1 Cro. Robsart vers. Andrews, Beer and Beecher's Case, Moor 700. and Dayrel and Thynn's Case, 1 Leonard 22. See 7 Ed. 4. 25. 9 Ed. 4. 32. 1 Co. 36. 5 Co. 37, &c.

But though such diminution cannot be alledged, nor a *certiorari* granted (after *In nullo erratum*, &c.) at the prayer of the party upon record, yet it may be granted on information given to the court by any person (as an *amicus curiæ*, &c.) of the defect in the record: but this is in the judgment and discretion of the court, as was held in Weaver and Felton's Case; entered Hill. 1 Car. 1. Rot. 647. B. R. where the defendant pleaded an *In nullo erratum*, and then alledged diminution, and prayed a *certiorari*, which at first was granted, and the record certified, &c. But before this was entered of record in B. R. the court were informed thereof, and refused to receive it, because it came in at the prayer of the party,

which it ought not to do: but upon information (by one as *amicus curiæ*) they granted it; and at the same time they looked into Bishop's Case, 5 Co. 37. b. where, though my Lord Coke reports, That after *In nullo erratum* pleaded, diminution may be alledged, yet in the case cited there was no *In nullo erratum* pleaded, but judgment was against the defendant by *nihil dicit*, and then the diminution alledged, and the *certiorari* granted at the prayer of the party, came time enough. And note the reason given in 7 Ed. 4. 25. by the judges, Why after *In nullo erratum* pleaded, diminution cannot be alledged; viz. Because it appears by the very record, that all the parties thereto are agreed, that it is a true and perfect record, and therefore the parties themselves shall not be admitted to contradict their own agreement, appearing in the record: yet it seems the court on information, *ut supra*, may take notice of the diminution, and then *ex officio* are to award a *certiorari ad informandam conscientiam curiæ*. Quære.

If a writ of error is brought in C. B.

diminution of the record, and pray a writ unto the justices who certified before the record, to certify all the record; and the writ shall be such:

B *The king to his beloved and faithful W. of T. greeting: Whereas at the prosecution of I. of H. suggesting to us that manifest error had intervened in the record and process, and also in the giving of judgment of the plea which was before you and your companions our justices of the bench, by (b) our writ, between W. of T. (c) demandant, and I. of R. (c) tenant, of fifteen messuages with the appurtenances in S. We lately commanded you, that if judgment thereof was given, then you should send to us, under your seal distinctly and openly, the record and process of the plea aforesaid, with all things touching them, and our writ which thereupon came to you, so that we might have them on the morrow of Saint Martin last past, wheresoever we should then be in England; and now on the behalf of the aforesaid I. of H. it is shewn unto us, that although under pretence of our said writ you may have sent before us on the said morrow the record and process aforesaid in some part thereof, yet other part of the same record and process, and also certain other things touching them, still remain before you to be sent, to the no small damage and grievance of him the said I. of H. Therefore, if so it is, then we command you, that you send to us, under your seal distinctly and openly, the residue of the record and process aforesaid, and also all other things touching them, which, as is before said, remain before you to be sent, and this writ; so that we may have them, &c. (as above).*

C. B. of a judgment in an inferior court, and the judgment is there affirmed, and then a writ of error is brought in B. R. on the judgment so affirmed; in that case no diminution can be alledged of the record in the inferior court: for now the judgment in C. B. is only in question. So resolved *Pas* 20 *Jac.* 1. B. R. *Bannister and Kennedy's Case.*

(b) But if the writ of error, &c. were in the time of another king, then the form of this writ is otherwise. *Dyer* 105.

(c) It is sufficient to name them so, without saying *filius & hères*, or *assignatus*. Yet error was brought on a recovery in covenant against one and his assignee. *Dyer* 356.

Dedimus potestatem de Attornato faciendo.

Post. 156.

IT seemeth, that before the statutes which gave power C unto a man to make an attorney, the justices would not suffer that the plaintiff, or the defendant, or the demandant, or the tenant, should make attorney in any action, suit or bill, in any court of record, nor in any other court which was not a court of record, because the words of the writ do command the defendant for to appear, &c. and that was always taken to be in proper person.

W. 2. c. 11.

Tr. Attorn. 1.
84.

The form of entry in every action for the plaintiff, or demandant, is: *And the aforesaid plaintiff hath on the fourth day offered himself, &c. and the aforesaid defendant cometh not; therefore it is commanded to the sheriff, that, &c.* by which it is taken, that the plaintiff was to appear in proper person. But now by the statutes he may make attorney in a court baron, or other courts; and may make attorney for suit personal at the hundred, or other court baron; but for suit real at the leet, or at the sheriff's torn, he cannot do it by attorney, but he ought to do the same in proper person. But it seemeth that the king by his prerogative, and before the statutes, might give warrant unto a man to make attorney in every action or suit, and that as well unto the demandant or tenant, as unto the plaintiff or defendant; and that he may direct his writs or letters unto the judges of courts, commanding them to admit and receive such persons by their attorney, and that the judges are bound to do the same. And it seemeth one cause is, because it shall (a) not be error, if the judge do admit any (b) plaintiff or (b) defendant to make attorney in any suit or action, in which by the law

(a) *Vide ante* 22. D. 8 Co. 50. b. 37 H. 6. 27. But to admit one who is within age to appear by attorney, is error. 22 H. 6. 31. 1 H. 5, 6. Dyer 262.
 11 H. 4. 29. 22 H. 6. 13. 24 Ed. 3. 25.
 (b) Where he may appear in person. See 36 Ed. 3. F. Error 86.

he ought not to make attorney: *Quod vide* in title *Error*,
H. 36 Ed. 3. and title *Attorney*, *T. 37 H. 6.*

D And if tenant for life be impleaded in a *præcipe quod* 37 H. 6. 27.
reddat, he in the reversion may pray to be received to de-
 fend his right upon the default of the tenant, or upon his faint pleading, and there he cannot pray to be received by his attorney. But if he bring a writ unto the justices out of the chancery, testifying that he hath made attorney there, and rehearse the cause whereof, that is to say, because (c) he is sick, or other reasonable cause, and commanding them to receive such person by attorney for him 25 H. 7. 9.

Br. Attorn. 1.
 81.

(c) See 18 *Ed. 3.* 47. in the case of the Earl of Gloucester, who being sick, &c. his attorney found sureties for issues, &c. because the warrant was *ad faciend' quicquid prædict' comes faceret si præsens esset.* See 4 *H. 4.* 1. 13 *H. 6.* 28. And so it is of a re-
 cluse or feme covert.

But if the writ be *ad recipiend' attorn' ad defendend'*, &c. *Si contingeret* that the baron makes default at such a day. If in case the baron does not make default, but appears, and renders, and afterwards she makes default, &c. she shall not be received by attorney, but ought to have her general writ. 9 *H. 6.* 37.

Note; There are three cases of *re-
 sceit*, viz. 1. *Quia prægnans.* 2. *Quia reclusa.* 3. *Quia in periculo mor-
 tis.* And that the writ being, *acce-
 pimur*, &c. & *legale testimonium tes-
 tatur quod uxor*, &c. *ita infirmatur*,
 &c. is good. 19 *H. 6.* 46. a. b.

Note; When an attorney is made, he continues so always pending the plea. If the tenant makes an attorney in *C. B.* and afterwards conu-
 sance is granted, he shall be attorney for the tenant in the franchise also; and therefore the tenant cannot be effoined. Adjudged, because he had an attorney to remove, &c. So an attorney in *C. B.* is also attorney at the *nisi prius.* So an attorney made

at first by the tenant shall be attorney in *C. B.* after the plea resummoned; and yet in none of these cases is the attorney bound to travel, &c. And expressly by *Banks*, If the tenant appear by attorney in *C. B.* and judgment is given against the defendant on an erroneous process, and then the record is removed by error into *B. R.* and the errors redressed, so that they are to plead again upon the original, the attorney made by warrant in *C. B.* shall serve also in *B. R.* 21 *Aff.* 17.

And *Note*; When judgment is given against the tenant, after the judgment the warrant of his attorney is determined: but the demandant's warrant of attorney is not expired by the judgment; for he may sue execution within the year; but after the year he cannot sue out execution without a new warrant. See 8 *Ed. 3.* pl. penult. 33 *H. 6.* 44. a. 34 *H. 6.* 51. a. b. A warrant of attorney against the tenant or defendant shall serve against the vouchee or garnishee. But by *Rikill*, not for him who interpleads with another in a writ of ward; *quod Brian concessit.* 7 *H. 4.* 3. pl. 9. adjudged 8 *H. 4.* 9. b. And therefore in the case of interpleader it must be said expressly, That he is attorney to cause his master to appear, &c.

Post. 27. D.
Plow. 76.
Post. 27. B.

in the reversion; the court ought and is bound to receive him by his attorney. And it is not material whether the cause put in the writ be true or not, for it is not traversable, &c.

Aliter 27 H. 8.
Br. Attorney
84.

And the king by his letters patent may license a man to make a general attorney *in all pleas moved and to be moved, and in whatsoever courts*: and by his letters patent he may express who shall be attorney, &c. or may grant to make attorney whom or who he will, without naming any attorney by his special name. E

And the king by his writ may send to any person to receive attorney for another, such person generally as the other will name, or such persons specially; and that may be as well for the demandant or plaintiff, as for the defendant or tenant.

Register 9.
Br. Attorney
84. that is intended of the king's court; for it doth not extend to base courts, as court baron, &c.

And the king may give authority unto one person to receive attorney for another in all pleas and in all courts, for two or three years. And the king may grant a *dedimus potestatem* to receive attorney for another, for a special cause recited in the writ, because he is languishing, or lame, or decrepid, &c. or such other like special cause. Or he may grant a *dedimus potestatem* in the generalty to receive attorney for another in all pleas, without expressing any cause in certain wherefore he doth so.

Vide 32 H. 6.
22.

[26]

And also it appeareth by the register, that the king by his letters patent may grant unto the prior of Saint *John's of Jerusalem*, that he may make two of his friars, and name them, &c. in his place, which is in the place of a proctor; that the two friars shall make attorney for the prior in every action which is pendent, or to be brought against him in any court, &c. and for to challenge his liberties, and for to defend them. F

And also the king by his letters patent may grant unto an abbot, for the devotion that he oweth to the house, that he may make a general attorney for all pleas and in all courts; and the said abbot may remove him and put others in his room, as often as it shall seem good and needful for him so to do: and so by this it doth appear, that the king may grant unto all his subjects to make at- A

tornies in the same manner, without putting or shewing any cause in the letters patent.

B And it appeareth by the register, that the king may grant the same as well by letters patent under his privy seal, as by letters patent under his great seal.

And when the king makes a general grant unto an abbot, or unto any other, to make such general attornies, then it seems the abbot shall come into the chancery, or shall send his deed under his seal unto the chancellor, witnessing that he hath made such and such persons his attornies, &c. And thereupon the chancellor shall make letters patent unto the abbot, testifying that he hath made such and such persons his attornies in all pleas and courts; and upon these letters patent shewed unto the court, the judge ought to admit and receive those persons for attornies for the party; and these letters patent shall be entered upon record in the chancery.

C And the king may send his writ unto the justices of the common pleas, or unto the justices in eyre, or other justices whatsoever, testifying that such a one hath made his general attorney in all pleas and quarrels moved against him or by him, and also to challenge his franchises, or to defend his franchises, commanding the justices by the writ that they receive him for attorney, &c.

There is another writ also in the register, That the king by his writ shall command his justices in eyre, that they admit and receive the claim of such a one to certain liberties, which he shall make and claim before them by his attorney, because himself cannot be personally before them at the day.

D There is another form of writ to the justices, that they admit such a one by his attorney, whom the said party shall make his attorney by letters patent under his seal.

(a) And a man may make his attorney before the justices, without making an attorney in chancery, or without suing any writ unto the justices, commanding them

(a) *Note*; An infant shall not be admitted to be attorney. 1 H. 5. 6.

to admit any attorney for the party, plaintiff or defendant; as the common course is at this day for an attorney for every party to appear in every manner of action, that they can appear by attorney, and (b) put in their warrants without any such writs, if not, that they be in writs of entry in the *post*, or writ which is by covin between the parties, or a writ of right: then the justices in discretion do not admit any man to appear as attorney for the party defendant, unless the defendant do before some justice confess him to be his attorney, and that the justices do record the warrant, or otherwise that he bring a writ out of the chancery, testifying that he hath there made attorney, commanding them to receive him for his attorney.

22 Ed. 4. 2.
3 H. 4. 5.
29 H. 6. 43.
42 Ed. 3. 31.
47 Ed. 3. 21.
21 Ed. 4. 77.
8 H. 6. 29.
3 H. 4. 4. 6.
33 H. 6. 28.
V. 9 Ed. 4. 36.
ante 25.
2 H. 4. 23.
3 H. 4. 2.
41 Ed. 3. 29.
1 H. 7. 25.

But there are divers cases in which the justices will E not admit the defendant by attorney; as, if he came in by *cepi corpus* (a), they will not admit him by attorney until he hath pleaded some plea, and then in discretion they use to suffer the defendant to make attorney. But if the defendant come by *cepi corpus* upon the exigent, the justices will not admit him to make attorney, but give him day by bail from term to term, until the matter be determined; and that seems to be at their discretion for his contumacy; for in that case, if they do admit him to make attorney, and to go without bail, it is no error; as it seemeth unto me.

(b) If one appears by an attorney who has no warrant of record, yet if he was admitted before by a justice, and is afterwards entered, it is good. 4 Ed. 4. 13. a. b. So if one is accepted by the court to be attorney before his appearance. 41 Ed. 3. 1, 2. and see 44 Ed. 3. 45. b. where one was admitted conditionally by the judge, viz. if his master would assent, and after the appearance the master assented, &c. 7 H. 4. 4. held good; and see 11 H. 6. 42.

The justices of C. B. may record a warrant of attorney taken before a

judge of B. R. notwithstanding the statute.

A warrant of attorney must be recorded before judgment. See now the statute 4, 5 *Annæ* for amendment of the law.

(a) Trespass was brought against A. and B. the defendant comes in by *cepi corpus*, where in the *capias* the words (*de Banco*) were omitted. And yet because the roll was right, he could not make an attorney. 8 H. 5. 2.

(b) At

- F** (b) At the *grand* or *petit cape* returned, the tenant may appear by attorney, and tender to wage his law, and take day to wage the same; at which day he ought to appear and make his law. See 7 *H.* 4. 3.
- G** And a man shall not make an attorney against the king in any action sued by the king. 9 *Ed.* 4. 4. 22 *Aff.* 72. 37 *H.* 6. 27. acc.
- H** Upon a rescous returned by the sheriff, and an attachment awarded upon it against him, the defendant shall not make attorney; but upon his appearance shall be presently committed unto the *Fleet*. But if the king send a privy seal unto them, commanding them that they admit attorney for him, the court ought to receive the attorney without appearance in proper person. 37 *H.* 6. 27. acc. 5 *H.* 7. 3. 5 *Ed.* 4. 6. 8 *Ed.* 4. 3.
- I** And a man shall sue a writ of error by attorney, if he be not in ward. 5 *H.* 7. 7. One cannot assign errors by attorney.
- K** In an appeal the plaintiff shall make attorney against the abettors, if he sue against them a *disfringas*, &c. even after issue joined. 40 *Aff.* 17. 1 *H.* 7. 27. 7 *H.* 4. 2. 32 *H.* 6. 22. 39 *Ed.* 3. 26. after 147. a. 21 *Ed.* 3. 48. Hill. Br. Attorney 36.
- L** In a *quem redditum reddit* the defendant shall not make attorney but with assent of the parties (c). 15 *H.* 7. 6. 9 *Ed.* 4. 2. acc. 32 *H.* 6. 22. 9 *H.* 7. 11. 3 *H.* 7. c. 1. Rastal, Murder 2.
- Con.* In a *quid juris clamat*, or *per quæ servitia*, after a plea pleaded the defendant shall make attorney. It seemeth likewise in a *quem redditum reddit*. 7 *H.* 4. 2. 44 *Ed.* 3. 34.
- M** In a *præmunire* the defendant shall not make attorney without a special writ directed to the justices.
- N** After a *capias ad computandum* awarded, the defendant shall not make attorney.
- O** (d) A man may demand conusance of pleas by attorney.
- P** (d) The plaintiff after appearance shall make attorney in an appeal by the statute of *H.* 7.

(b) The mesne shall not join in aid with the tenant in replevin by attorney: but the lessor by process may join by attorney with the lessee plaintiff in replevin. 4 *Ed.* 3. F. Joinder in Aid 16, 17. 1 *H.* 4. 28.

(c) See *Dyer* 135. b. A *dedimus potestatem* to justice *Saunders* to resort to the defendant in a *quid juris clamat* to receive an attorney to plead, &c.

(so to receive an attornment) *propter impotentiam & senectutem*.

Note; The matter and substance of the plea is contained in the writ. See 48 *Ed.* 3. 57. 7 *H.* 4. 2. 1 *H.* 7. 27. 6 *H.* 7. 10.

(d) See 15 *H.* 7. 9. 9 *Ed.* 4. 2. 40 *Aff.* 17. 21 *Ed.* 4. 73. 8 *Ed.* 4. 313. *Bro. Attorn.* 91.

(a) He

27 H. 8. 11.
2 R. 3. 9.
41 Ed. 3. At-
torney 5c.
2 R. 3. 9.
Perkins 41.
11 H. 4. 28.
Newton acc.
21 H. 7. 39.
contra.
21 Ed. 4. 73.
33 H. 6. 18.

(a) He who pleads *misnomer* shall not make attorney; A
quod vide P. 41 Ed. 3. & M. 45 Ed. 3. Fitz. Attorney
52.

In a *scire facias* upon a charter of pardon, the plaintiff B
in the *scire facias* shall not make attorney; but with the
assent of the other party he may.

(b) A feme covert may be attorney for her husband. C

(c) At the *sequatur sub suo periculo*, the vouchee shall D
not enter into the warranty by attorney.

In *attaint* the petit jury shall make no attorney. E

The defendant shall not make an attorney in *Maihem*. F
10 Ed. 3. 2.

An idiot shall not be received to sue or defend in any G
action by guardian, or by *prochein amy*, but ought to be
always in proper person. P. 33 H. 6. f. 20. 12 Ed. 2.
Bro. Guardian 26.

29 Aff. 67.
Affis. 273.

3 H. 6. 17.
Markham.

(d) An infant shall sue by *prochein amy*; but if the in- H
fant be defendant in any action, he shall make his defence
by guardian, and not by *prochein amy*. And the court
shall assign the guardian for the infant defendant, and
that is commonly one of the officers of the court. 40 Ed.
3. f. 16.

An infant sued a writ of *waste* against his guardian,
and made attorney in that action. 48 Ed. 3. 10. 13
Ed. 3. Bro. Guardian 24.

34 H. 6. 32.
It ought to be
sued in proper
person by one
of full age.

34 Aff. 5. acc.

An infant was received to sue an action of *debt* by his
guardian. 16 H. 7. 5.

(e) And a man shall not answer as guardian unto an I
infant who is plaintiff or defendant without a warrant;
but as *prochein amy* to an infant he shall sue an action
without a warrant.

(a) Not he who acknowledges him-
self a villein. 21 Ed. 3. 10. a. But
otherwise, if his plea of villeinage be
in bar. 29 Ed. 3. 41. a. b. Kelw.
135.

(b) Bro. Attorney 91.

(c) See 11 H. 4. 28. That he
shall not do it *gratis* at the first day of
vouching.

(d) 40 Ed. 3. 16. West. 2. c. 15.
27 H. 8. 11. 3 H. 6. 16. 1 H. 5.
6. 29 Aff. 67. 27 Aff. 53. Quære
2 Cro. 641.

(e) 19 Aff. pl. 103. 4 Aff. pl. 5.
33 Aff. pl. 3. 34 Aff. pl. 5. 33 Ed.
3. F. Guardian, pl. 25.

K The infant shall not remove his guardian, nor disavow an action sued for him by *prochein amy*. *Anno 43 Ed. 3. Lib. Ass. & Anno 27 Ed. 3. Lib. Ass. 53.*

L And the king by his letters patent may make a general guardian for an infant, to answer for him in all actions or suits brought or to be brought in all manner of courts. Or may make two or three guardians jointly and severally to answer for him, or to bring any action for him; and at the request of the infant may grant by the said letters patent, that the same guardians may make other guardians jointly or severally in their places, to sue or defend for the same infant in all actions and suits which are brought or sued, or shall be brought or sued after.

M And the infant shall have a writ in the chancery for to remove his guardian, directed unto the justices, and for to receive another, &c. and the court at their discretion may remove the guardian, and appoint another guardian.

N And see in the register, after the writ of *protection cum clausula nolumus*, writs directed unto the bailiffs of hundreds to receive and admit such persons by attorney in court, which the party will make under his seal, or otherwise: and also writs of *dedimus (a) potestatem* to remove attornies made, and to put others in their places, or to remove any of the attornies, and to put another in his place. And if a man make attornies in chancery to answer and defend in other courts, he may come in chancery and remove him, and make others his attornies: and thereupon he shall have a writ unto the justices of the court where the attorney is, testifying that he hath removed him, and made another his attorney, commanding them for to receive him, &c.

3 H. 6. 16.

An infant appeared by guardian, although it be in a personal action; but *quære* if he can sue personal action by *prochein amy*.

8 H. 6. 8.

Ashton.

(a) See 21 Ed. 3. 12. In a writ of ward brought by baron and feme, the feme by writ removed her attorney, and held good. *Quære*, if she may disavow her attorney. 33 H. 6. 31. And *Note*; If an attorney appear for one, he may before any plea pleaded come in and disavow his at-

torney, and the appearance of the attorney shall be held null and void: but after plea pleaded by one as attorney, he cannot come in and disavow his plea; but as to that is put to his writ of *disceit*; yet he may remove the attorney (by writ). 8 H. 6. 8. See 17 Ed. 3. 12.

There

3 H. 4. 18.
Feme proceeded
to be received
and plead, which
was not by at-
torney.

There is a *dedimus potestatem* granted in the register to P
receive an attorney for him who is vouchee, because he
is received for the default of tenant for life: and a writ
directed unto the justices to receive an attorney for a
woman, who prayeth to be received for the default of her
husband, before she be received. And another writ unto Q
the justices, to receive attorney for one defendant, and
guardian for another defendant.

21 H. 6. 48.
cont. before 25.
c.

In *quale jus* awarded, where a *scire facias* shall be award- R
ed against the lords mediate and immediate, they shall
have a writ directed to other persons to receive attorney
for them to appear to this *quale jus* to defend their right;
and upon certificate thereof in the chancery, he shall have
a writ to the justices before whom the *quale jus* is to be
tried, to admit him who is received attorney, and so re-
turned in the chancery, for attorney for the lords in that
action.

Ante 25. D.

In detinue or ward, where shall be interpleading, they S
ought to appear in proper person and interplead, &c.
And yet upon reasonable cause he may make attorney in
the chancery, and shall have a writ unto the justices to re-
ceive him for his attorney, and rehearse the cause where-
fore; yet it seemeth it is not material whether the cause
be true or no.

Ante 25. D.
3 H. 4. 28.

Also there is another writ in the register directed unto T
the justices for him in the reversion, where tenant for life
is impleaded, commanding them for to admit attorney for
him in the reversion, if the tenant for life make default,
as he conceiveth he will, and testify in the same writ,
that he in the reversion hath made such and such his at-
tornies jointly and severally, commanding the justices to
receive them for attornies, because that he in the reversion
hath such an infirmity, that he cannot pray to be received
in proper person. And the like writ for a feme covert
who hath a reversion, and the tenant for life is impleaded,
and she conceiveth that her husband will not pray to be
received, &c. But in the writ it shall be mentioned,
that the feme is decrepid, or hath some other infirmity,
that she cannot conveniently come to be received in pro-
per person.

19 H. 6. 46.

There

V There is another manner of writ for the sheriff, or for the escheator, to cause the barons of the exchequer to admit attornies for them to make their proffers in the exchequer; and yet they are commonly bound in recognizance to do the same in proper person. And the writ is such :

A *The king to his treasurer and barons of his exchequer, greeting: Because our beloved B. our sheriff of Suffolk, is so much attending about our certain business of great concern, wherewith we have specially charged him, that he cannot be personally present before you at our exchequer on the very morrow of Saint Michael, or on the very octave of Easter next coming, at his proffer then there, as the manner is; we of our special favour command you, that for this time you receive R. and I. clerks, whom the said sheriff before us in our chancery hath made attornies in his place to make his proffer aforesaid before you on the said morrow, or either of them, if both cannot be present in the place of the said sheriff for this purpose, not in any manner molesting or grieving him the said sheriff for his absence on that day, or on the octave aforesaid. Witness, &c.*

[28]

And the escheator may have the like writ for his proffers to make attorney. But it seemeth this is not a writ of course, but upon a special commandment directed unto the chancellor by the king to make such writ, &c. And the king may send a writ unto the treasurer and barons of the exchequer, to respite the account of the sheriff, and of the escheator; and the writ shall be such:

The king to the treasurer and barons, &c. greeting: Because our beloved W. of H. our sheriff of Wiltshire, is so much attending about our certain business, &c. (as above) that he cannot come before you at our exchequer on the very morrow of Saint Michael next coming, to his account of the issues of the county aforesaid; we have given to him respite for rendering his account aforesaid, until the octave of Saint Hilary next coming, and therefore we command you, that you permit him the said sheriff in the mean time to have that respite. Witness, &c.

Protection.

V. 27 Ed. 3. 88.
39 H. 3. 8. &
Stat. Prærog.
Regis 25 Ed. 3.
c. 19.

Protections are in divers forms and of divers effects, and **B**
the king may grant them for divers causes. And
there are four manners of protections with the clause
volumus. One is a protection, called *quia profecturus*.
And another protection, *quia moratur*. And the third is
a protection which the king by his prerogative may grant;
and the same is where a man is debtor unto the king, the
king may grant unto him, that he shall not be sued nor
attached, but taketh him into protection until he hath
paid the king his debt. But now by the statute of 25 *Ed.*
3. 19. it is ordered, That the creditor shall have an ac-
tion against the king's debtor, and shall have judgment
against him notwithstanding such protections. But he
shall not have execution against the king's debtor who
hath such protection, unless he take upon him to pay the
debts which the king's debtor owed unto the king; and
then he shall have judgment and execution against the
king's debtor for both debts, &c.

Quere. Co.
Calvin's case 8.
a.

There is another protection *cum clausula volumus*; and **C**
that is, when the king fendeth a man in his service into
the wars beyond the seas, or into the marches of *Scotland*,
and there he is detained and kept prisoner; he shall have
a special protection reciting the whole matter; and in the
end of the same protection shall be such clause: *these pre-* **D**
sents not to avail after the delivery of the aforesaid R. from
the prison aforesaid, if it happen that he is again to be deliver-
ed from the same. And the form of divers of these pro-
tections doth appear in the register. But as the law is
now, every protection cast shall not be allowed: for if the
protection be to endure for two or three years, the justices
will not allow the same; and therefore the form of the
protection at this day is to endure for one year and a day
after the date thereof, and then to sue forth a new protec-
tion, if need be. And a protection may be cast for the **E**
party by a stranger as well as by the party himself.

And

- F And protection *quia profecturus* shall not be allowed, if it be presented hanging the plea, if he be not in a voyage royal; and a voyage royal is, where the king goeth to the war, or his lieutenant, or his deputy lieutenant, and not otherwise. 39 H. 6. 38, 39.
- G And the plaintiff cannot cast a protection, (a) for the protection is always for the defendant, and shall be cast for him; if it be not in special cases, where the plaintiff becometh defendant. But when a protection shall be allowed, and when not, appeareth more plainly in the title of *protection* in the great abridgment of the years, and therefore it is not needful to shew it here. 38 Ed. 3. 1.
- H And by the *register* a man shall be by protection, when he stayeth upon the safeguard of the West-marches of England against Scotland. Yet *Anno* 22 *Ed.* 4. such protection was disallowed. But I am of opinion with the *register*.
- I A protection *quia moratur* upon the sea was disallowed, *Trin.* 36 *H.* 6. because that the sea cannot stay, and by consequence he cannot stay upon the sea.
- K And a protection shall be allowed in a court of ancient demesne, or in other court of record, as *London*, &c. And when the plea is removed, the protection may be

(a) Nor may the plaintiff in *replevin* after avowry. 20 *R.* 2. *F. Protection* 106. 5 *H.* 5. 5. 24 *Ed.* 3. 26. *contr'* 17 *Ed.* 3. 24. *a. per Shard.* Nor for the defendant therein after an avowry by him. 38 *Ed.* 3. 1. *a. Finchden.* 25 *Ed.* 3. 43. Nor the plaintiff in an *audita querela*. 47 *Ed.* 3. 5. *b.* Nor the defendant therein. 13 *Ed.* 3. *F. Protection* 71. But this is intended when the estate is to be executed, and not when it is already executed, and the suit is to have execution: for it seems there, if it so appear by the writ, the protection is allowable at the *venire facias*. 47 *Ed.* 3. 3, 4. In a *scire fa-*

cias on a charter of pardon against the plaintiff, after the plaintiff has counted, a protection lies for the defendant; but not before. 43 *Ed.* 3. 36.

In a *quod ei deforceat*, after the tenant has made title, a protection does not lie for him. 38 *Ed.* 3. 2. but it does before. 43 *Ed.* 3. 6. But after title so made for the tenant, it lies for the plaintiff. 20 *R.* 2. *Protection* 106. 5 *H.* 5. 5.

It lies for the garnishee at the day of the return of the *scire facias*; but not after he has made title. 3 *H.* 6. 18. 9 *H.* 6. 36.

7 H. 6. 21.
contr' if they
plead; vide Plea
in Tres.

15 Ed. 4. 27.

4 H. 4. 4.

4 H. 4. 5.

allowed: (a) and a protection allowed for one defendant doth put the plea without day for all the rest; if not that it be in special cases, as in trespass, where they plead several pleas, and he shall sue several *venire facias* upon the issue joined against them, &c.

And a protection shall be sometimes disallowed for variance betwixt the writ and the protection: but see that in the title *Protection* in the Abridgments.

(b) Protection shall be allowed for an infant; but there are divers opinions amongst the justices, if it shall be allowed for a feme covert.

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And how a protection shall be made void, see title *Protection*, and in the title *Repeal* in the Abridgments.

There is another manner of protection, *cum clausula nolumus*, as appeareth in the register; and that is, where an abbot or a prior, or other spiritual person, be in fear or doubt that his goods or chattels, or his cattle, shall be taken by the king's officers for the king's service; they may purchase this manner of protection *cum clausula nolumus*. And by the register appeareth, that the king may grant unto a secular man this writ as well as unto a spiritual man: and if he do so, the same is good, &c.

And a man may excuse his default at the *grand cape* or *petit cape*, by casting of a protection.

And if a man be effoined of the king's service, the plaintiff may have a special writ directed unto the justices to disallow of the effoin, if he be not in the king's service, commanding them for to proceed, &c.

And it appeareth by the Register, f. 280. that there are divers manners of forms of protections: where a man feareth to travel the country with his merchandizes, or to collect the alms for the poor of an hospital, or of the

(a) In a *præcipe* against two, or if two tenants by warranty are, and they vouch or plead to issue, and one of them makes default, yet a protection lies for the one or the other; and at the day of the *petit cape* the parol shall not be put without day against the other. 5 H. 5. 7. Yet

11 H. 4. 7. adjudged *contr'*, if it was at the *grand cape*, or before default by him made. 13 Ed. 3. *Protection* 70. 19 Ed. 2. *Protection* 77.

(b) See *Co. Lit.* 130. a. That a protection lies for a feme *quia nutrix*, *latrix* or *obstetrix*.

church,

church, then they may purchase letters patent of the king's protection, commanding the king's subjects for to defend them, and to maintain, aid and assist them: and the form is such:

E *The king to all his bailiffs and faithful people to whom, &c. greeting: A. hath besought us, that whereas he prosecuteth his divers affairs in our courts, and elsewhere within our kingdom of England; and the same A. by reason of such prosecution is afraid of damage, as well to himself as to his men and servants in their persons and in his affairs, by certain persons emulating him, and by their procurement; (or thus) damage of his body and loss of his goods, which easily may be, &c. and peril which easily may happen, we will graciously take care of his security in this behalf; we being willing to preserve peace and tranquillity every where in our kingdom, have taken him the said A. and his affairs aforesaid, prosecuting in our said courts, and elsewhere within our kingdom of England, while he stays there, and in returning from thence to his own, and also his men and servants, and his things and goods whatsoever, into our special protection and defence; and therefore we command you, that you maintain, protect and defend him the said A. in prosecuting his said businesses in our courts, and elsewhere within our kingdom aforesaid (as is premised) in his staying there, and in his returning from thence to his own, and also his men and servants, and his things and goods whatsoever, not bringing upon them, or, as much as in you lies, permitting to be brought upon them by others, any injury, trouble, damage, violence, hindrance or grievance; and if any thing has been taken from them as a forfeit, or been injured, you cause amends to be made to them for that without delay: nevertheless, provided that he the same A. do not prosecute, or attempt or presume in any manner to attempt or prosecute any thing, which is in prejudice of us or our people, or which is against, or may tend to weaken an ordinance lately made thereupon by Lord E. lately king of England, our grandfather. In testimony whereof, &c.*

F *And these letters may be made and directed to sheriffs, admirals, mayors, and all other officers, &c. And thereby it appeareth, that they ought to see and provide, that such persons who have purchased such letters, have by reason of such letters favour and right done unto them,*

because it appeareth the king's will so to be, &c. And there is the like protection for those who go with pardons, or to make collection for bridges or highways; and the like for spiritual persons; and the like protection for merchants strangers, which go into the country to gather their debts, or to sue for them, &c. There is another form of protection, which is such:

(a) *The king to all and singular our sheriffs, escheators, G mayors, bailiffs, ministers, and to all our faithful liege people whatsoever, as well commons of our town of Southwark, as to others within and without the liberties, who shall see or hear these our present letters, greeting: Know ye, that we have taken into our special protection T. W. and his men and servants, manors, lands and tenements, his goods and possessions, being in London, Southwark, Hatham and H. in the county of Surry, and in S. C. and D. in the county of K. and also his writings and muniments whatsoever: and therefore we command you, that you maintain, protect and defend him the said T. W. and his men, servants, manors, lands, tenements, goods, possessions, letters, writings and muniments aforesaid, not bringing or permitting to be brought upon them, or any of them, any injury, trouble, damage, violence, waste, destruction, or burning of his houses or other his goods and chattels, or other hindrance or grievance: and by the faith, love and allegiance whereby ye are bound to us, ye may in no wise omit, nor may any of you omit these things under a grievous forfeiture to us. In testimony whereof, &c. to continue for one year. Witness, &c.*

And another protection for the prior of St. John's, and H for his priory, &c. And those are of divers forms, as appeareth in the title of *Protection* in the Register, and therefore see them there. But these protections are by the king granted of grace; for every man who is a loyal

(a) Where the king takes the lands, goods, &c. into his protection, by reason of dilapidations by an abbot; in an assise against the abbot and one G. S. his lessee, he shall not have aid of the king: for when a man is taken into the king's pro-

tection, by reason whereof another man is delayed of his action, such protection being without cause, shall be no cause to have aid of the king, which would cause further delay of the party. 11 H. 6. 10.

subject, is in the king's protection; but these protections are granted to move and excite the king's subjects to aid and comfort those who have such protections, in their business which they have to do in the countries, for the causes mentioned in the protections. And it appeareth by the Register, that every spiritual person may sue forth a protection for him and for his goods, and for their fermors of their lands for their goods, that they shall not be taken by the king's purveyors, nor their carriages or chattels taken by other the king's officers. And it appeareth by the same protection, that king *Edward* in the fourteenth year of his reign, by special statute did grant such privilege to the clergy, whom he took into his protection, with their goods and carriages. And they may have a special commission directed unto certain persons to arrest such purveyors or officers, and to send them before the king's council, there to answer their misdoings in such case; and for the same protection see the Register, fol. 289.

[30]

(a) *Writ de Droit de Advowson.*

B **A** Writ of right of advowson lieth only for him who hath an estate in the advowson to him and his heirs in fee-simple, or right of estate to him and his heirs in fee-simple in the advowson; and if he be disturbed to present, then he shall have the writ. But if a man have an advowson to him and the heirs of his body begotten, and for default of such issue, &c. the remainder unto him and his heirs in fee-simple; if he be disturbed, he shall not have this writ, but a *quare impedit*, because he hath not

4 Ed. 3. 18.
44 Ed. 3. 25.
Wilby Brief 713.
and Br. Estates
65. Tenant in
tail brought this
writ, and recovered but an
estate in tail.
24 Aff. 4.
Br. Tail 24.
he may have
darein presentment.

(a) This writ being brought by an abbot parson imparsoned, if he counts that he holds to his proper use, &c. he shall have judgment accordingly; but if he counts on a presentment, *contra*. See 11 H. 4. 88. a. b. and Note, without such surmise, he shall not have such a judgment nor execution; and yet upon a general judgment one shall have a *scire facias* against the parson to have execution to hold to one's proper use, &c. See 19 Ed. 3. Judgment 124. yet *quare* 34 Ed. 3. *Quare impedit* 197. 32 Ed. 3. Judgment 141.

H 3

title

title to the advowson but in tail, and he ought to maintain the action by that title that he claimeth the possession of the advowson, and that is of an estate in tail. And in this writ he ought to count of his own possession, or of the possession of his ancestor; otherwise the writ doth not lie, and he ought to alledge esplees (b) in the parson; as in taking of gross tithes, oblations and obventions unto the value of, &c. And the tenant shall come and make defence, and (c) may join the mise by battel or grand C
assise, &c. And see the form of the count, and the defence, and of joining the mise, in the book of *Entries*, fol. 90.

39 H. 6. 20. a. And a man who claimeth to have fee simple in an ad- D
vowson, may have a writ *of right of advowson of a moiety of the church, or of one third part, or one fourth part of the church, &c.*

31 H. 6. 3. a. And when a parson sueth in the spiritual court for E
tithes, which do amount unto the fourth part of the advowson, against the parson of another parish; then that parson who is sued in the spiritual court may purchase a writ which is called *indicavit*; which writ is a prohibition, and shall be directed as well unto the judge of the court as unto the party, that they do not proceed in the plea, &c. And then the patron of that parson who is so prohibited by the *indicavit*, may have and sue a writ of *right of advowson of dimes*; and the form of the writ is such:

Command A. that he render to B. the advowson of the tithes of one third part of the church of S. or of one fourth part, or of a moiety of the church, &c.

And this writ is founded upon the statute of *West. 2. c. 5.* in the end of the statute, and doth not lie of a less part of the tithes than of the fourth part of the church.

See 31. A.

But it seemeth that at the common law, before the statute, a writ of *droit des dimes* lay and was maintainable;

(b) And therefore by *Thorp*, if a clerk be instituted, but not inducted, he shall not have this writ of right of advowson. 38 *Ed. 3. 9. a.*

(c) In this writ the summons shall be made on the glebe, and the glebe shall be taken into the king's hands at the *grand cape*. 11 *H. 6. 3, 4.*

as, command, &c. that he render, &c. the advowson of the tithes of one fifth part, or of one sixth part of the church, &c. And that by the statute of 18 Ed. 3. which is: *Whereas writs of scire facias have been granted to warn prelates and other religious clerks to answer dismes in our chancery, and to shew if they have any thing, or can any thing say, wherefore such dismes ought not to be restored to the said demandants, and to answer as well to us as to the parties of such dismes; that such writs from henceforth be not granted, and the process hanging upon such writs be annulled and repealed, and that the parties be dismissed from the secular judges of such manner of pleas: saving to us our right, such as we and our ancestors have had, and were wont to have of reason.*

F And by that appeareth, That before that statute the right of tithes was determined in the king's temporal court; but the statute hath now altered the law. And if a parson be sued in the spiritual court for the fourth part of the tithes, for which he purchases *indicavit*, &c. by which the judges do surcease; if the patron of the parson which sueth in the spiritual court hath but an estate in tail in the patronage, or for term of life, he shall not have a writ of *droit des dismes*, nor other remedy by the common law, to try the right of the tithes, for the feebleness of the estate. But if two be seised of an advowson, and unto the heirs of one of them, they shall join in a writ of right of advowson for the advantage of him who hath the fee simple. 31 H. 6. 14.

G And also a man shall not have a writ of *indicavit* before that the party hath libelled against him in the spiritual court. And he ought to shew the copy of the libel before the *indicavit* be granted: and the *indicavit* doth not lie after judgment given in the spiritual court. 12 Ed. 4. 13. b.
St. 34 Ed. 3.

(a) And a writ of right of the advowson of the tithes and oblations of one fourth part of a church lieth as well as of the advowson of the tithes of one fourth part of the church only.

(a) And the defendant shall have the view, though there be but one church in the same town. 38 Ed. 3. 13. a. But one shall not have a writ of right of advowson of the tithes of a carve of land, because it does not thereby appear, whether it be of the value of a fourth part of the church. 18 Ed. 2. Brief 825.

If one be parson imparsoned, and another be vicar in I
the same church, and one of them be impleaded of the
fourth part of the tithes of the parsonage, and the other
impleaded of the fourth part of the tithes of the vicarage,
they shall have several writs of *indicavit*, and their patrons
may have several writs of right of advowson of the tithes,
&c.

And it appeareth in 13 H. 6. by the opinion of *For-* K
tescue, that before the writ of *indicavit* lay of tithes sued
in the spiritual court, there was no writ of *droit des dimes*
sued thereupon. But it seemeth against reason; for the
writ of *droit* of tithes lay as well for the patron, as the
indicavit lay for the parson.

And in 31 Ed. 1. it appeareth that a man shall have a B
writ of right of *the moiety of an advowson*, where an ad-
vowson is partible betwixt two coparceners, and one of
them is disturbed by a stranger.

But the writ of right of *the advowson of a moiety of a*
church lay where two coparceners do present two parsons
to one advowson, &c. As there are in some churches
two parsons, &c.

Co. Lit. 17. b. And a writ of right of advowson lieth of *the advowson* C
of a vicarage, or prebend, or chapel, and such like, as well
as of *the advowson of a church*. And the king shall have
such writ as well as a common person. But a man shall D
not tender a demy mark against the king to inquire of
the seisin alledged in the king's count or declaration, as
he shall in case a common person bring the writ. Nei-
Ibid. 294. b. ther shall a man have final judgment against the king,
although it be after the mise joined betwixt the king and
the tenant.

And a man shall have a writ of right of advowson of a E
chapel which is a donative, as well as he shall have if it
were presentable, to the ordinary.

Affise de Darrein Presentment.

F **T**HE form of the writ of *darrein presentment* for a common person is such :

The king to the sheriff, greeting: If A. shall make you secure, &c. then summon, &c. twelve free and lawful men of the neighbourhood of B. that they be before our justices, &c. ready to recognize by oath what patron in time of peace presented the last parson, who is dead, to the church of C. or the last vicar, who is dead, to the vicarage of N. which is vacant, as it is said, and the advowson whereof, he the same A. says, belongs to himself; and in the mean time let them view that church, and cause their names to be impanelled, and summon B. who deforceth him of that advowson, that he be (a) then there to hear the recognition; and have you there the summoners and this writ. Witness, &c. But for the king the writ is; The king to the sheriff, greeting: Summon by good summoners twelve free, &c. and shall not say, If the king shall make you secure, &c. because the king shall not (a) find pledges to sue an action, for he shall not be amerced, &c.

G (b) And a man shall have *affise of darrein presentment*, although he nor his ancestors do present to the last avoid-

4 Inst. 180.
Note, That upon quis advocatus, &c.
20 Ed. 3.
Darrein presentment 13. per Wilby, and 9 Ed. 2. Ibid. 17.
If the affise find title for a stranger not named in the writ, a writ to the bishop shall be awarded for him; and therefore one cannot make title to a presentment in time of war.
7 Ed. 2. Dar. Presentment.
26 Ed. 3. 41.
Ibid. 4. acc.

West. 2. c. 5.

(a) *Note*; The party is to be summoned at the church. 11 H. 6. 4. per Martyn; and in this action he shall not vouch any but him who is party to the writ. 21 H. 6. 50. a.

(a) *Note*; As to pledges, if a writ be directed to a sheriff of a matter within a franchise, the plaintiff shall find pledges to the sheriff, and then the sheriff shall send to the bailiff of the liberty, but the bailiff shall not take pledges; and if he does, the sheriff shall be amerced, and a *ficut alias* shall issue. 22 Aff. 3. 14 H. 6. 3. 21 H. 7. 14. pl. 22.

Note; He who shall not be amerced on a nonsuit, shall not find pledges, as the plaintiff in a *quid juris clamat*,

or *seire facias*. 11 H. 4. 7. 18 H. 6. 2.

Note; The clause, *And have you there the names of the pledges*, is intended of the plaintiff's pledges; but if it be omitted, yet the writ is good. 26 Ed. 3. F. Brief 898.

(b) See *Kitchin* 118. If the husband seised in his wife's right present, and then the wife dies, so that he is tenant by the curtesy, and then the church becomes void again, the husband shall have an *affise*, &c. But if lessee for years presents, and it is afterward confirmed to him for life on the second avoidance, he shall not have an *affise*, because he is in of a new estate.

ance;

Bro. Presentment 62.

10 Ed. 3.

Dar. Presentment 13. If the assise find that tenant by the curtesy or tenant in dower was the last who presented, by that the heir shall have a writ to the bishop, and yet he cannot make title by that presentment: *contra* in a quare impedit. And Seton gives the reason, because he cannot convey by them. But if the heir do alledge the last presentment in herself, and the assise be to her by default, and found *ut supra*, yet the heir shall recover: *contra*, if they be at issue upon that presentment.

16 Ed. 2. Darrein Presentment 20.

ance: as if the tenant for life or for years, or in dower, or by the curtesy, suffer an usurpation unto a church, &c. and die, he in the reversion, who is heir unto the ancestor who last presented, shall have an assise of *darrien presentment*, if he be disturbed. But if a man present, and then (c) grant the advowson unto another for life, and he suffer one usurpation, or two, or three usurpations; now at the next avoidance he in the reversion shall not have an assise of *darrein presentment*, if he be disturbed to present. And that appeareth by the statute of *West. 2. cap. 5.* That the remedy of the statute is given for the heir of him who made the demise, who is in reversion, and not for the lessor himself. 18 Ed. 2. pl. 20. 6 Ed. 3. 41.

And if a man present unto an advowson, and afterwards the parson doth resign, or is deposed, and the patron presents again, and is disturbed, he shall have an assise of *darrein presentment*; and the form of the writ shall be, *What patron in time of peace presented the last parson, who is dead, to the church, &c.* although that he resign, and be living. And the form of the writ is to suppose that the defendant doth deforce him of the advowson, and yet by his count he counteth, that he or his ancestors last presented unto the advowson, by which he doth suppose that he is in possession of the advowson; and yet the same is good.

H

(c) See 2 Ed. 3. 11. The heir of the grantee of a reversion shall avoid this for a purprise on the tenant for life; in a *quare impedit* brought by *Stanhope* against the bishop of *Lincoln*, this was denied by all but one. But see the contrary held by *Moyle* and *Prisot.* 34 H. 6. 26, 27. and so is 33 H. 6. 12.

Note; If a feme purchaser takes a husband, who suffers an usurpation,

and the husband dies, she is without remedy. 1 Ed. 2. *Quare impedit* 43. Yet it seems if the husband, and she being enseint, present, and after suffer an usurpation, &c. she shall have a *quare impedit.* 17 Ed. 3. 4. by *Shard* and *Thorp.* See *Dyer* 259. pl. 1. and *post.* 34. S. that she shall have it.

If

If a man do present unto an advowson unto which he hath right, and afterwards the incumbent dieth, and a stranger usurpeth, and presenteth unto this advowson in the time of war, and after that incumbent dieth; now if he who hath right do present again, and be disturbed, he shall have an affise of *darrein presentment*, and this presentment made in time of war by the stranger shall not grieve him.

And so if a man present unto an advowson, and afterwards the incumbent (a) dieth, and another ordinary doth present by lapse another incumbent, and after that incumbent dieth; now the right patron shall present, and if he be disturbed, he shall have an affise of *darrein presentment*, notwithstanding the mean presentments.

And so if the guardian do present in the right of the heir, and the incumbent dieth, the heir shall present; and if he be disturbed, he shall have an affise of (b) *darrein presentment*, although the guardian did present the mean and the last presentment. But if a man present unto an advowson, and after lease the same for term of years, and after the church is void, and the tenant for years doth present, &c. and then the incumbent dieth, and the lessor presenteth, and is disturbed; it seemeth that he shall not have an affise of *darrein presentment*, because the tenant for years did present in his own right. But tenant for years shall have affise of *darrein presentment*, if he have presented

8 Ed. 2. 96.
20 Ed. 2.
Darrein Presentment 11. 13.
Post. 33.
6 Ed. 3. 41.
Darrein Presentment 4.
7 Ed. 3. ib. 2.
20 Ed. 3. pl. 12.
6 Ed. 2. Dar. Presentm. 16.
20 Ed. 3. ibid. 13. for the ordinary shall present in the right of him who hath right. Vide 14 Ed. 3. Dar. Presentm. 19.
Berry saith, that he hath seen the presentment in the name of the heir. 20 Ed. 3. ib. 12. Green. acc.
5 H. 7. 16. ac.
50 Ed. 3.
Holt contr.
14 H. 7. 12. per Fairfax.

(a) *Nota bene*; 20 Ed. 3. pl. 12. 7 Ed. 4. 20. 22 Ed. 4. 9. contra per Brian, &c. 6 Ed. 2. pl. 16. 30 Ed. 3. pl. 13. contra of tenant in dower. 5 H. 7. 10. b. 15. 14 Ed. 3. Darrein Presentment 34.

(b) *Note*; The issue in tail may maintain an affise of *darrein presentment*. 46 Aff. 4. *Quære* of tenant in dower *supra*. 5 H. 7. 10. 15. 14 Ed. 3. Darrein Presentment 34.

Sir W. W. If the bishop present by lapse, pending which the church

avoids, he in reversion shall not have a *quare impedit*, but *darrein presentment*. 46 Aff. 4.

Note; The statute *Westm. 2.* gave a *darrein presentment* to him in remainder on a presentment by the tenant in dower, by the curtesy, &c. *Contra*, it seems where the ancestor of him in remainder had not presented. *Quære* 20 Ed. 3. Darrein Presentment 13. And mention is to be made of his ancestor's particular presentments in setting forth his title.

before; and so shall the guardian of the heir, if he have presented before.

35 H. 6. 60.
Mes Com. 230.
Quare. Yet all
is one descent per
11 Ed. 3.

[32]

Assise 87.
17 Ed. 3.
Dar. Present. 9.
Shard; she hath
no other remedy
but a *quare im-*
pedit. Pole
acc'.

If a man usurp upon an infant, and present, which in- K
fant hath the advowson by descent; and afterwards the
incumbent dieth, the infant shall present; and if he be
disturbed, he shall have an assise of *darrein presentment*.
But if the infant purchase the advowson, and present, and
afterward the church become void, and a stranger present,
and usurp upon the infant, and then the incumbent dieth,
the infant presents, and is disturbed by a stranger; he shall
not have (c) a *darrein presentment*, but shall be put to his
writ of right.

(a) If the husband and wife present unto an advowson
in the right of the wife, which is appendant unto a manor
of the wife's, and after the husband alien one acre, parcel
of the manor, with the advowson in fee, unto a stranger,
and dieth, and the stranger presents, and alieneth the acre
unto another in fee, saving the advowson unto himself,
and then the church voideth; the wife shall present; and
if she be disturbed, she shall have an * assise of *darrein pre-*
sentment, because the advowson was severed from the acre;
but if the advowson were appendant to the acre, then the
wife ought to recover the acre before she present to the
advowson.

20 Ed. 2.
Dar. Presentm.
11 and 13. but
they seem to
make a differ-

And assise of *darrein presentment* doth not lie for one A
coparcener against the other, as appeareth *M. 20 Ed. 3.*
and *M. 15 Ed. 3. pl. 10. Post. 34. N. P.*

ence, when the disturbance is before the composition to present by turns, and when after.

33 H. 6. 32.
The church
never is litigious
betwixt parce-
ners; for if they
cannot agree,
the ordinary

And if one defendant die in a *darrein presentment*, the B
writ is good by the survivor against the other.

If a disturber present unto an advowson, and the patron C
bring an assise of *darrein presentment*, and pendent the writ
ought to admit the presentee of the eldest; but contrary of joint-tenants. 34 Ed. 3. 16. 12 R. 2.
Counterplea de Vouch. 433.

(c) See 35 H. 6. 63. *Post. 34.*

* *Post. 36. F. 22 Ed. 3. 6. 17*

(a) See *Post. 34. 17 Ed. 3. 3. Ed. 3. 3.*

22 Ed. 3. 6. and *Co. Lit. 333. a. 363.*

the incumbent dieth, if the disturber presenteth another incumbent and dies; yet the patron shall have an affise of *darrein presentment* upon the first disturbance against the heir of the disturber, *per Journeys Accounts*; and so if the disturber present two or three times within the six months, the very patron shall have an affise of *darrein presentment* upon the first disturbance.

D And it was provided before the lord the king, the archbishops, bishops, earls and barons, that for the future no affise of *darrein presentment* be taken of *prebendal churches*, nor of *prebends*. Hil. 19 H. 3. Vide post. 35. R.

This proviso is taken away by West. 2. 29.

(b) *Quare impedit.*

E THE form of the writ of *quare impedit* for the king in the right of the crown is such:

The king to the sheriff of Lincolnshire, greeting: command W. archbishop, and R. that they permit us to present a fit person to (c) the church of W. which is void, and belongs to our gift, and whereof W. archbishop, and R. unjustly hinder us, as it is said: and unless, &c. summon, &c. the aforesaid archbishop and R. that they be before us, &c. or before our justices of the bench, &c.

Vide Fitz. Nat. Brev. 25. Where a man may have an affise of *darrein presentment*, there he may have a *quare impedit*, but not *e contra*. C. 5 Part 102. In a *quare impedit*,

the writ was to the church; and the count of the *advowson* of two parts.

For the king may sue this writ, and every writ, in what court he will.

Infra. 47. D. 48. E.

(b) *Note*; The summons in this writ shall not be made at the church, as it shall be in a right of *advowson*, for in this writ the *advowson* is not demanded, but the disturbance is to be punished for the damage done to the person, by *Danby* and other justices. 11 H. 6. 3.

(c) *Note*; There needs not the name of the Saint, as, *ad ecclesiam de Sancta M. de W.* except there be more churches in the same vill. 9 Eliz. Dyer 259. 13 H. 4. 872.

Note also; A writ brought by the king or queen is not *unde queritur*, that the defendant *injusse*, &c. 18 Ed. 3. 1, 2. (as it is in the case of a common person); also if the words *ut dicitur* be omitted, the writ is good; yet see 38 Ed. 3. 31. That in the king's case it shall be *ut dicitur*, but in that of a common person, in all writs it shall be *ut dicit*, and if it be *ut dicitur*, the writ shall abate. 17 Ed. 3. 50. 74.

And

And if the king hath title to present unto an advowson, by F
reason of the lands and temporalities in his hands, of a bishop-
rick, or abbey, or guardianship of an heir, then the writ is:

The king to the sheriff of Lincolnshire, greeting: Command W. archbishop, that he permit us to present a fit person to the church of W. which is void, and belongs to our gift by reason (a) of the bishoprick of Canterbury being lately vacant and in our hands; and whereof the same archbishop unjustly hinders us, as it is said, &c.

And if it be unto the prebend, then thus: *To the prebend of I. in the church, &c. which is void, &c. by reason of the bishoprick, &c.* And if it be by reason of ward, then the writ shall be; *which is void, and belongs to our gift by reason (b) of the wardship of the land and heir of T. some time earl of A. deceased, who held of us in chief, being in our hands; and whereof the aforesaid, &c. unjustly hinders us, &c.*

And if it be by reason of wardship by occasion of another wardship, then the writ is; *which is void, and belongs to our gift by reason of the wardship of the land and heir of J. T. being in the hands of Lord E. lately king of England, our father, by reason of the wardship of the land and heir of S. of C. some time Earl of Gloucester, deceased, of whom the same J. held his land by knight's service, being in the hands of our same father; and whereof the same, &c. unjustly hinders us, as it is said.*

And by the register the king shall join with another per- G
son in a *quare impedit*; and the form of the writ is such (c):

(a) *Ratione Episcopatus*, i. e. *Temporalium Episcopatus*. 15 Ed. 3. F. Brief 679. *ratione Abbatie vel Episcopatus*. 39 Ed. 3. 21. But if it be by alienation without licence, the writ is general, and the count special. 14 Ed. 3. *Quare impedit* 54.

(b) A writ was brought by the queen in the like case, *Ratione minoræ ætatis I. filii & hæredis S. in custod' reginæ existen' de qua præd' S. terram sua' tenuit in capite*, where by the count it appeared, that he held of one G. who was the queen's ward, and yet held good. 24 Ed. 3. 54.

(c) It is held by some, there is a diversity, viz. Where the king has part of a thing *ratione prærogativæ*; there, if it be intire, he shall have the whole, as if one of the obligees be *felo de se*, or outlawed, the king or his assignee shall have the action sole; but if he has title to a parcel or part, by another, there the king may join, as if an obligation be made to a customer for customs, &c. there the king and the customer shall join. See 8 Ed. 4. 4. a. 24. b. 19 H. 6. 47. a. 10 H. 4. 3. Dyer 95. Post. (or Lib. Parliament.) 288.

The king to the sheriff, &c. Command R. of C. that justly, &c. he permit us and P. of T. to present a fit person to the church of K. which is void, and by reason of the wardship of the land and heir of I. who was the wife of T. of N. who held of us in chief, deceased, being in our hands, belongs to the gift of us and of him the said P. of T. and whereof the aforesaid, &c. unjustly hinders us and the beforementioned P. of T. &c.

But now the common opinion is, that the king shall have the whole presentment alone, and alone shall have the action. But methinks that it stands with reason, that the king and the other join; as in a popular action the party shall sue for the king and for himself, and the words of the writ are, *Who sues as well for the lord the king as for himself*, &c. and that in an action of debt, &c. and by the same reason the king may sue for himself and for the party. And the common experience is, that a man shall hold lands in common with the king, and also chattels: and by the same reason they may have the presentment or advowson in common.

11 Ed. 3.
Br. quare impedit

See 20 H. 4. 3.
contr. and
9 H. 6. 60.
contr. but not
jointly.

H And if a man be disturbed to present unto a parsonage, then the writ shall be (a), *Command, &c. that he permit him to present, &c. to the church, &c.* for the word *ecclesia* is always intended a parsonage. And if it be a vicarage, then the writ is, *That he permit him to present to the vicarage.* And if it be a prebend, then, *to the prebend*; and if a chapel, *to the chapel*; and so he ought to (b) name the advowson as it is, &c. 8 H. 6. 22.

A A man shall not have a *quare impedit de advocat' medieta-*
B *tis, nec de medietat' advocacionis, &c.* And if one man hath the nomination unto an advowson, and another hath the presentation, if he name his clerk, and he who hath the

[33]

14 Ed. 4. 2.
31 Ed. 3. 185.
2 R. 3. Quare
impedit 102.
1 H. 5. 1, 2.
17 Ed. 3. 12.

44 Ed. Quare impedit 76. 21 H. 6. 17. infra C. D. H.

(a) And Note; Such writ was at the common law. 14 H. 3. *Quare impedit* 183. *ad capellam.* 2 H. 3. Grants 89. *ad vicariam.* that it is but a chapel; for *ecclesia* shall be intended a parish church. 5 Ed. 3. 60. 22 Ed. 3. 2. a. 12. a. 8 H. 6. 32. a. 37. a. 13 H. 4. Brief 870. & infra E. F.

(b) In a *quare impedit præsentare ad ecclesiam*, it is a good plea to the writ,

pre-

presentation present (c) another clerk; he which hath the nomination shall have a *quare impedit*, and the writ shall be, *That he permit him to present, &c.* and in his (d) count he shall set forth the special matter, and it shall be good.

(e) And so if a man hath a chantry, which is a dona- C
tive by letters patent, and he give the same unto a clerk, who is disturbed by another, or another doth present to his chantry, or giveth the same by letters patent; he which hath right shall have a *quare impedit* of that dona- tive; and the writ shall be, *That he permit him to present, &c. to the chantry, &c.* and in the count he shall set forth the special matter. See 14 H. 4. 11.

And if a bishop be disturbed to present where he ought D
to make collation, the writ shall be, *That he permit him to present, &c.* and he shall count upon the collation. (a)

(b) And so if the king be disturbed to collate by his E
letters patent unto his free chapel, he shall have a *quare impedit*, and the writ shall be, *That he permit him to present, &c. to the prebend* in his free chapel, &c.

14 H. 4. 36. b. And a *quare impedit* lieth of a priory, or of an abbey; F
and the writ shall be, *That he permit him to present to (c)*

(c) See accordingly 1 H. 5. 1, 2. 4 Ed. 3. 69. 21 H. 6. 17. a. and he shall have a writ to the bishop to admit the presentee whom he has named to another, whether the writ be brought against him who had the presentation, or against a stranger; yet see 24 Ed. 3. *Quare impedit* 27. and 2 R. 3. *Quare impedit* 102. that it lies not for him who has only the nomination.

(d) See accordingly 22 Ed. 4. 22. a. 14 Ed. 4. 2. b. and 14 H. 4. 11. the writ *Quod permittat nominare* was abated by award in the like case.

(e) A *quare impedit* of a chantry ought to shew in what church or chapel the same is. 12 H. 4. 19. See *Lib. Intr.* 499.

A *quare impedit* lay of a chapel at common law. 24 H. 3. *Quare impe-*

dit 183. And so it did of a prebend. 13 R. 2. *Brief* 643.

Note; A *quare impedit* of a prebend must be brought in the county where the cathedral church is, and not in the county where the body of the prebend lies. 15 Ed. 3. *Brief* 235, 643.

(a) See 16 Ed. 3. *Brief* 660. *Rast. Ent.* 501. 17 Ed. 3. 64.

(b) See 13 H. 4. *Brief* 870. where *ecclesia* shall be intended a parochial church. See 16 Ed. 3. *Brief* 660. *ant. H.*

(c) *Note*; A priory may be parochial and presentative, and then the writ may be, *ad ecclesiam*. 13 H. 4. *Brief* 870. 18 Ed. 2. *Brief* 828. and *Trespas* 237.

the priory or abbey, &c. See the book of *Entries* 59. and 18 *Ed.* 3. *Quare impedit* accordant 151.

G And there is another form of writ, *That he permit him to present to the church of the house of Saint Martin of Bristol, which is void, &c.* and so of an hospital, and the like. *Vide Lib. Entr.* 506.

H And a man shall not have a *quare impedit* if he cannot alledge a presentment in himself or in his ancestors, or in another person, from whom he claimeth the advowson, and that in his count, if it be not in special cases: as if a man at this day erect a church parochial by a licence of the king, or other chantry, which shall be presentable, &c. if he be disturbed to present to the same, he shall have a *quare impedit*, without alledging of presentment in any person, and shall count upon the special matter.

21 *Ed.* 4. 2, 3.
16 *H.* 7. 8.
Keble ac.

I (d) And if a man doth recover an advowson against another in a writ of right, when the church voideth he shall present, and if he be disturbed, he shall have a *quare impedit*, and alledge the presentment in him against whom he recovered, without alledging any other presentment.

Post. 36.

And a man shall have a *quare impedit*, and alledge a presentment by his proctor, and it shall be good, without alledging a presentment in himself: *Quod vid.* 17 *Ed.* 3.

Post. 35. G.

K (e) And if an abbot hath been parson imparsoned time out of mind, and afterwards the abbey is disturbed, he of whom the advowson is holden shall present, and if disturbed, shall have a *quare impedit*, without alledging of any presentment in the count, but shall shew the special matter.

C. 2. Part 47.
b. ac.

L (f) If coparceners make partition to present by turns, and so do, and afterwards the younger sister die, her heir within

Ant. 32 G.
22 *Ed.* 4. 9.

(d) See 14 *Ed.* 2. *Quare impedit* 171, 172. where he may have a *scire facias* on the judgment for the disturbance, but that on the judgment in a writ of right, he had seisin delivered by the sheriff; yet for that he cannot have seisin of the church without a presentment; when the church avoids, he shall have a *scire facias* for

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the presentment. 15 *Ed.* 2. *Quare impedit* 172.

(e) In a *quare impedit*, the plaintiff ought to declare that the presentment was made in time of peace. 18 *Ed.* 2. *Quare impedit* 175. ant. 31.

(f) See 21 *Ed.* 3. 32. If the king has an advowson in common, or with another, as by reason of non-age

I

31 Ed. 3.
Quare impedit 2.
 38 H. 6. 9.
 Dyer 322.
 21 Ed. 3.
 Br. *Quare impedit* 73.

within age, and in ward to the king, and afterwards the church void two or three times during the nonage of the heir, who is the king's ward; the king shall present, and if he be disturbed, he shall have a *quare impedit* alone, as it appeareth *Mich. 22 Ed. 4.* But, saving the opinion of the book, I conceive the law to be otherwise; because the inheritance of the presentment is (a) several, &c. (b) M
 And if two sisters be, and have an advowson which becometh void, the eldest sister shall have the first presentment; and so the husband of the eldest sister (if he be tenant by the curtesy of the advowson) shall have the first presentment; and the tenant in dower shall have but the third presentment, &c.

16 H. 7. 8.
 3 Cro. 196.
 18 Ed. 3. 22.
 24 Ed. 3. 29.
 39 Ed. 3. 21.
 See 34 P.

(c) If the king have an advowson in fee, which voids, N
 and during the avoidance the king granteth the advowson in fee, the king shall not present to this avoidance: but if the king have an advowson by reason of the temporalities of a bishop, and during the avoidance the king restore the bishop the temporalities, yet he shall present unto the advowson, and not the bishop, for this avoidance.

(d) If the heir sue his livery and hath it, yet the king O
 shall present unto an advowson which became void during

age of an infant who has title to present by turn, or otherwise, the king by his prerogative shall have the presentment on every avoidance, as long as any of the lands are in his hands. See 21 Ed. 3. 27. The king made title only to the fourth avoidance by reason of wardship of the parcener, after partition made.

(a) But if the king's tenant dies, having issue three daughters under age, the king shall have all the presentments. See 31 Ed. 3. *Quare impedit* 100. 38 H. 6. 9. 22 Ed. 4. 9. 20 Ed. 3. *Quare impedit* 65. 45 Ed. 3. 12. 34 H. 6. 40.

(b) Vide *Post.* 34. (O. P.) 5 H. 5. 16. 18 Ed. 3. 22.

(c) Vide *contra.* Except there are special words of the avoidance. 16 H.

7. 8. Dyer 282. 302. a. 348. a. and see accordant 18 Ed. 3. 58. a. but contrary in the case of a common person. 11 H. 4. 54. b. and an avoidance fallen is not grantable by a common person. Dyer 283, 348. See *Stamf. Prerog.* 44. 46 Ed. 3. *Grants* 50. 18 Ed. 3. 22, &c. in marg.

(d) Note; If the king be seised of a manor to which an advowson is appendant, whereto he has no right of seisin, and afterwards there is an *ouster le main cum exitibus*; if an avoidance happens in the mean time, and the king has presented, the incumbent shall not be removed; but if he has not presented, he shall have the avoidance. See 5 Ed. 3. 6. 4 Ed. 3. 2. 18 Ed. 3. 21. 24 Ed. 3. 28, 29. 27 Ed. 3. 81, 89. 39 Ed. 3. 21.

the

the time that the advowson and land were in the king's hands. (e)

P (f) If a man be seised of an advowson in gross or in fee appendant unto a manor, and the advowson void, and

24 H. 8.
Dyer 4. C. 3.
Part 3.

Q he dieth, his executor shall present, and not the heir, (g) because it was a chattel vested and severed from the manor. And if a man be disseised of a manor unto which an advowson is appendant, and the advowson become void, the disseisee may present and have a *quare impedit*,

50 Ed. 3. 26.
ac. Vid. after
34 K. and 35 A.
29 Ed. 3. 5.
27 Ed. 3. 89.

R although he hath not entered into the manor. But if the bishop die, and the advowson happen void before his death, the king shall present unto the same by reason of the temporalities, and not the bishop's executors. 8 Ed.

2. *Presentment* 10. 39 Ed. 3. 21.

S (h) So if a man have a manor unto which an advowson is appendant in fee, and the church void in the father's time, and the father die, and his heir in ward to the king, the king shall have the presentment. 18 Ed. 3. 21.

2 H. 4. 19.
40 Ed. 3. 14.
after 44 K.
143 E.

27 Ed. 3. *Estoppel* 240. *Contr.* 39 Ed. 3. 21.

T (a) Guardian in socage of a manor unto which an advowson is appendant, and the church void, the heir shall present, and not the guardian, because he cannot account for the same.

V If the king grant unto an abbot and his successors, that the monks shall have the temporalities during the vacation; now if the advowson happen void during the vacation, the monks shall present to the same. *Mich.* 30 Ed. 3.

17 Ed. 3. 51.

(e) See 18 Ed. 3. 22. 46 Ed. 3. *Grants* 50. 6 Ed. 2. *Presentments* 9.

(f) See 21 H. 7. 21. 44 Ed. 3. 3. 21 H. 6. 9. 33 H. 6. 33. 9 Ed. 4. 39.

(g) See 9 H. 6. 33. 4 Ed. 3. 2. *contra.* 39 Ed. 3. 21. *contr. sed* 44 Ed. 3. accordant.

(b) Note; Though the six months pass in the father's life-time, the king shall have the presentment against the bishop, if the church be not full. 18 Ed. 3. 21. a. 29 Ed. 3. 8. Where the king grants the advowson

to A. till his full age, and the church avoids, during the term, and afterwards the heir presents, and comes of full age, before the church is full, the king shall have the presentment.

(a) It seems, the presentment ought to be in the name of the heir, and yet a guardian in a *quare impedit* against him may make title against the stranger in right of the heir, and also have a writ to the bishop thereupon, but he cannot maintain a *quare impedit*. 29 Ed. 3. 5, 14, 22. 27 Ed. 3. 89. a. 8 Ed. 2. *Presentment* 10.

Post. 34.

[34]

But in the case of a donative, the heir, and not the executor shall have such presentment.

2 Wils. 150.

7 H. 4. 32.

Dyer 260.

25 Ed. 3. 47.

Robert de Kelsey's Case.

The presentation to the vicarage doth of common A right appertain unto the parson; but he may grant the same to another by assent of the patron and ordinary.

The heir in tail shall not have a presentment fallen in the life of the tenant in tail, but the executor of tenant in tail. (b) So the termor shall have the presentment which B happeneth during the term, although he hath not presented during the term to the advowson, &c.

(c) The king may repeal his nomination or presenta- C tion, but a common person cannot do so. And the king D shall have a writ unto a bishop to induct one into a prebend which the king hath given unto him; and to give him a seat in the quire, and a place in the chapter-house.

And a man shall have a *quare impedit* of an hermitage, E and a writ to put him into corporal possession.

(d) If the king recover by *quare impedit*, and after- F wards ratify the estate of the incumbent; yet at the next avoidance the king shall present, because his recovery and judgment for him was not executed. T. 9 Ed. 3. In a free chapel of the king, where the dean ought to give the prebends, if he do not collate within six months unto them, then the king shall present by lapse to them as ordinary.

If an advowson be void by six months, at which time G the king is seised of the temporalities of the bishoprick, the king shall present to this advowson, as the bishop should do; and the king shall have a *quare impedit* of the sub-deaconry of York, which voided when the temporalities of the archbishoprick were in the king's hands; and the writ shall be, *That he permit him to present*; and yet

(b) See 9 Ed. 3. 10. 19 H. 6. 33. Perk. 21.

(c) The king may repeal his presentment, although the clerk be instituted, provided he be not inducted. 25 Ed. 3. 47. a. 38 Ed. 3. 49. But a common person cannot repeal his presentation. Dyer 292. a.

A patron nevertheless may present several persons accumulatively, and there shall be room for pleasing the bishop. Lindwood de Jure Patronatus, cap. 1. See 14 Ed. 4. 2.

(d) See a good case that accords herewith, 18 Ed. 3. 21. and see 9 Ed. 3. 20.

the

the king shall give this sub-deaconry by his letters patent.

H Where partition is made betwixt coparceners by licence of the king of an advowson in a court of record, as in the common pleas, and afterwards the coparcener who hath the next turn dieth, her heir within age and in ward to the king, and the church void; the king shall have a *scire facias* against the other coparcener, &c. upon that partition, and yet he was a stranger to the partition. 31 Ed. 3.

I (a) If two coparceners make partition to present by turns, although that one of the coparceners do afterwards usurp upon the other coparcener, and presents in her turn, that presentment shall not put her out of possession, but she shall have her turn when it falls again, and shall have a *quare impedit*, or a *scire facias* upon the composition if it be upon record, if she be disturbed for to present, &c. 6 Ed. 3. Qu. imp. 39.

K (b) If a bishop make a collation, and before induction or installation dieth, and the king seizeth the temporalities; he shall have this presentment, because that the church is not full against the king, until the parson or prebend be installed or inducted. 50 Ed. 3. 16.
31 Ed. 3. 4.

L (c) If a parson have a parsonage, and afterwards doth take another benefice without dispensation; now the first benefice is void, and the patron thereof may present, for this avoidance is called cession. 24 Ed. 3. 33.

M (d) If in time of vacation of an abbey or priory, a church happen void, which is of the patronage of the abbot or prior, and a stranger doth usurp and present Br. Presentment
al Eglice 46.

(a) See 12 Ed. 3. 9. 13 H. 8. 14.
22 Ed. 4. 9. 27 H. 8. 111.

(b) See 38 Ed. 3. 3, 4. And so it is of his tenant who dies before his clerk is inducted. 38 Ed. 3. 9. a. If the king has a presentation *pro hac vice*, and his clerk dies after institution, and before induction, the king shall present. 18 Eliz. Dyer 348.

See per W. W. 22 H. 6. 27. 21 Ed. 4. 34. 38 Ed. 2. 41. 11 H. 4. 91.

(c) See 4 Co. 74. b. 11 H. 4. 37.
60. 91. 5 Ed. 3. 9.

(d) See Co. Lit. 263. b. West. 2. c. 5.

If a parson be admitted and instituted by the bishop, he is parson against every common person before induction, and has the cure of souls, and shall have the profits before induction. 31 Ed. 3. 4. by Kirton and Moreton. (Sed quære per W. B.)

* 24 Ed. 3. 26.
See Co. Lit.
360.

thereunto; this usurpation shall not prejudice the successor*, but at the next avoidance of the said church he may present, and have a *quare impedit*; but otherwise it is if an usurpation shall be had in the time of his predecessor, for that shall put the successor out of possession, if the six months be past.

24 Ed. 3. 26.

If a vicarage happen void, and before the parson present, he is made a bishop, &c. yet he shall present unto this vicarage, because it was a chattel vested in him.

(e) The founder of a priory shall have a *quare impedit* against the subprior and the convent, if they disturb him to present to an advowson which belongeth to the house, if it void during the vacation, where the founder ought to have the temporalties during the vacation. P. 9 Ed. 3.

39 Ed. 3. 21.
Ant. 33 N.

If a man traverse an office found of a manor unto which an advowson is appendant, and upon the traverse (f) the king leaseth the manor unto him who tendered the traverse without mentioning the advowson, and afterwards the church void, he who tendered the traverse shall have the presentment, if the traverse be found for him.

5 Ed. 3. 6.

If a feme be assigned the third part of a manor unto which an advowson is appendant in dower, she shall have the third presentment.

14 H. 6. 24.
Newton, feme is disturbed and taketh husband, the church void, the husband presents, the same shall vest the right in the wife.

If the patron be outlawed in trespass, and the church void, the king shall present, because of the outlawry (a).

(a) (b) If a feme purchase an advowson, and take a husband, and the church void, and the stranger doth present, and the husband suffer an usurpation, &c. by this usurpation the wife shall be out of possession after the six months past; and she shall be put to her writ of right of advowson, if she have presented before; and if she have

(e) The patron of an abbey presentative brought a *quare impedit* against the superior (subprior) and convent. 11 Ed. 3. *Quare impedit* 157. 18 Ed. 3. 15.

(f) For in that case the lease amounts to a restitution, but if the king seizes a priory alien, and leases the priory to farm during the war,

without mentioning the advowson, the king shall have it. 29 Ed. 3. 18. (or 98.)

(a) See 26 Aff. pl. 71. 4 Ed. 6. 58. 35 H. 6. 63.

(b) 1 Ed. 2. *Quare impedit* 43. ante 31. I. West. 2. c. 5. 19 H. 6. 40. 22 H. 6. 26. 43 Ed. 3. 15. 22 Ed. 4. 9.

not

not presented, she is without recovery: but otherwise is it, if the feme shall have an advowson by descent or by course of inheritance.

T If an infant or a feme covert do not present within six months, the bishop may present for lapse (c).

U (c) One joint-tenant, or tenant in common, shall not have a *quare impedit* for the advowson which they have in common, or in jointure, if one of them present solely against his companion. But if two (d) coparceners cannot agree in the presentment, the eldest sister shall have the first presentment, and he who hath her estate shall have the first presentment; and if he be disturbed by the other coparcener, she or he who hath her estate shall have a *quare impedit* against the other (e) sister; and the coparceners, and those who have their estates, shall present as coparceners ought to do, *scil.* the eldest first, and then the middlemost, and then the third, and then the fourth, and so as they shall be of age, &c.

35 H. 8.
Dyer 55. Advowson descends to two coparceners, one of full age, and the other within age, the guardian marrieth the eldest, the church void, he presents in both their names, the youngest cometh of age. Some are of opinion, that if they do

not agree the eldest shall present, and it shall be her turn: others contrary. *Qu.* Co. Lit. 166. b. 1 Term Rep. C. P. 411.

X If an infant have a manor unto which an advowson is appendant, and suffereth a (f) usurpation when the church becometh void, and afterward at full age grants the manor in fee, and afterwards the church become void; the infant shall present, and not the feoffee of the manor, for the advowson was severed by the usurpation; and yet the infant may present to the same.

Post. 35. M.

[35]

A If the king's tenant hath title to present unto an advowson, which is void, and the six months pass; and afterwards the king's tenant dieth before the bishop presenteth for lapse, his heir within age, and in ward to the

18 Ed. 3. 21.
Ante 33. R.

(c) *Vide post.* 35. 6 Ed. 4. 10. 27 H. 8. 11. 34 H. 6. 40.

(d) See 9 Eliz. 333. a. Bro. Presentment al Eglise 53. 34. 56. 40.

(e) See Doctor and Student 116. b. ante 33. B.

(f) See accordant adjudged, 16 Ed. 3. F. *Quare impedit* 67. But contra by Danby, 33 H. 6. 13. in the

like case. Yet if the king was so seised, and granted the manor *cum advocatione*, at the next turn the grantee shall present; *per cur'*. For it was not made disappendant by the king's usurpation.

See 16 Ed. 3. Bro. Presentment 60. That an infant may present

king, the bishop shall not present for lapse, but the king shall have this presentment by reason of the wardship. *P. 18 Ed. 3.*

If tenant in tail of a manor, unto which an advowson **B** is appendant, discontinue the manor in fee with the advowson, and after the discontinuor granteth the advowson unto another in fee, and afterwards doth re-infeoff the tenant in tail of the manor, who dieth seised of the manor; his heir shall present unto the advowson, when it shall happen void: and if he be disturbed, he shall have a *quare impedit*, because he is remitted unto the manor, and hath not remedy to come to the advowson. *29 H. 6. Quare impedit 79.*

The defendant in a *quare impedit* may sue a *quare impedit* **C** against the plaintiff, if his clerk be not admitted nor instituted. And if the plaintiff's clerk be instituted and inducted pendent the writ, it shall not abate the plaintiff's writ; but in that case if the defendant recover against the plaintiff, he shall avoid the plaintiff's clerk; and so if the defendant's clerk be admitted pendent the writ against him, if the plaintiff recover, he shall avoid the defendant's clerk: but if the clerk of the defendant were admitted and instituted at the time of the purchase of the writ, and the plaintiff purchase the writ only against the patron, not naming the incumbent; although the plaintiff recover, he shall not avoid the defendant's clerk, because he might have named him in the *quare impedit*.

If a stranger do present unto an abbey or priory which **D** is eligible by the convent, and his clerk be instituted and inducted; *quare* how this wrong may be after redressed and reformed. See *22 H. 6. 25, &c.*

20 Eliz. 11.
Hare's Case,
he ought to be
inducted.

If a man have a chapel or chantry which is donative by **E** letters patent, and he (a) once present unto the ordinary his clerk to the chantry, he shall never after collate, but ought to present unto the bishop; and if he do not present within six months, the ordinary shall have advantage of the lapse. See *22 H. 6. 26, &c.*

(a) It is otherwise if a stranger does it alone. *22 H. 6. 25, 26. Vide post. 42.*

F A presentment made by a stranger unto an advowson which is appropriated unto an abbey, be the presentment in the time of vacation, or in the time of the abbot, is void, although that the clerk be instituted and inducted: but if the abbot himself present unto the (b) bishop his clerk to an advowson which is appropriate to his house, this presentment doth disappropriate the advowson, and make it presentable after; and if he do not present within six months after every avoidance, the bishop shall present for lapse. The bishop ought to present his clerk for whom it is first found by a *jure patronatus*. See 34 H. 6. Post. 48. H.

G 39.
H The bishop shall have the advantage to present by lapse, where the church doth become void by resignation or deprivation, without giving (a) notice thereof to the patron. See 5 Ed. 4. 9. 1 H. 7. 9. Bro. Notice, &c.

I Where the bishop doth refuse the clerk of the patron for non-ability, or for crime, he ought for to give (a) notice

1 H. 7. 9.
12 & 13 Ed.
Dyer 293. e.
237.

Doctor and
Student 177.
12 Eliz.
Dyer 293.

(b) So that it seems the presentment without institution, &c. is a disappropriation. 11 H. 6. 32, 33, 22 H. 6. 28.

See *Plowd.* 500, 501. Bro. *Quare impedit* 38, 111. 38 H. 6. 39.

(a) Nor shall lapse devolve to the king without notice. See also touching notice, 7 Eliz. Dyer 2. 5 Ed. 4. 9. 1 H. 7. 9. Bro. Notice 6 & 29. and 14 H. 7. 21. A diversity where the patron is a layman, or not. Also 15 H. 7. A diversity where it is of a matter whereof the patron may take notice, or not.

(Sir M. H.) Note; No lapse shall be without notice, although that the church be declared to be void, for that the incumbent was *mere laicus*. Dyer 293. *Pickering's Case*, in the case of a layman. In the case of death the six months shall be computed from the time of the death, and where the patron presents, and the bishop refuses for non-ability, the bishop ought to

give notice of the six months: yet if the patron does not present within six months from the time of the death, (and in that case, not from the time of notice of the refusal) the lapse shall incur. Dyer 327. b. &c. for the church of *Haughton*. And see there, that notice ought to be given at the church door, if the patron cannot be personally found. Dyer 346. *Baron's Case*. And for the form of a public intimation of deprivation for not reading the articles, see Dyer 369.

(Sir W. W.) The statute 24 H. 8. of residence, cap. 2. If one has a benefice with cure of eight pounds value, and takes another, the first shall be void as if he were dead. Here the bishop need not give notice to the patron, because it is void by the statute, by Dyer and *Weston*; which *Brown* denied, and said, that the notice remained at common law, and by the common law the bishop should give notice of the cession where one had a plu-

notice thereof to the patron, otherwise he shall not present for lapse; but after the six months past, the patron shall have a writ to the bishop, if the church do remain void, and the bishop hath not collated thereunto.

See 13 Ed. 4. 3.
11 H. 4. 80.
38 Ed. 3. 3.

The chancellor of *England* shall present unto all the king's churches which are under the sum of twenty marks by the year, which are in the king's gift, and in the right of the crown: but if the king hath them by any other title, then the chancellor shall not present unto them. K

Co. 10 Part,
134.
38 Ed. 3. 36.
Co. Lit. 246. a.

The death of one plaintiff, nor the nonsuit of one plaintiff, shall not abate the writ, but he shall be severed. L

Where an infant hath an advowson by descent, and the church voideth, and he who hath title paramount doth usurp, and present unto the same church, and the six months do pass; he is remitted by this usurpation, and the infant out of possession, and without remedy by that usurpation. M

If a man hath an advowson, and the church doth become void, and two strangers do severally present their clerks to the bishop to that advowson; the patron shall have divers *quare impedit*s against them, if he will, and shall have several judgments, and shall recover several damages for their several presentments and wrongs done. N

17 Ed. 3. 60.
Fitz. *Quare impedit* 68.

If a man maketh another his proctor, to present unto all his advowsons, and to do several things for him; if the proctor present, as proctor unto him, unto an advowson unto which he hath right to present in his own right, that presentment shall put him out of possession of the advowson, and shall give the possession to the other. O

In a *quare impedit* for the king, although the defendant hath a writ unto the bishop against the king, the king may P

plurality, &c. 7 *Eliz.* 116. See
2 *Wilf.* 174. 1 *Bl. Rep.* 490. 3
Burr. 1504.

26 *H.* 8. If any spiritual person be certified by the bishop into the exchequer for non-payment of tithes, that *ipso facto* the church shall be void.

Here the bishop shall not give notice to the patron of this avoidance, because a newer avoidance is given by the statute, than was at the common law before, by *Dyer* and *Weston*, 7 *Eliz.* which *Brown* expressly agreed, (denied) *ut supra*.

have

have a new *quare impedit* against him of the said avoidance, and make other title.

Q If prior and convent ought to chuse the abbot, and name him to the patron, and he to present him to the bishop, and they chuse one for abbot, and name him to the patron, (a) and the patron doth present another to the bishop; they may sue in the spiritual court for remedy, as it is said, *H. 11. Ed. 3. Tamen quare*; for it seemeth they are enabled to sue at the common law, as well as they are enabled to chuse and name the abbot. As the prior of *Westminster* and the convent hath power to sue their abbot for an advowson. *M. 20 Ed. 3.*

See 11 Ed. 3.
Quare imp. 117.

40 Ed. 3. 28.
per Fortescue.

If the disturber present two or three times within the six months, yet a *quare impedit* lieth against the disturber upon the first presentment, if he purchase the writ within the six months.

A Where a man doth recover in a writ of right of advowson, he shall present at the next avoidance, and shall have a *quare impedit*, without alledging any presentment in himself or his ancestors, but shall declare upon the record, (b) or may have a *scire facias* upon the recovery. And so may his heir have a *scire facias* upon that recovery against the heir of the other party, at the next avoidance after the recovery; but not after, as it seemeth.

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16 H. 7. 8.
per Keble.
39 H. 6. 25.

B If a man recover in a *quare impedit*, he shall have a *scire facias* against the patron and the incumbent who made default, if he will sue execution of this recovery (c).

15 Ed. 2. fol.
174.

C If coparceners make partition in the chancery, or in the common pleas, to present by turns, and afterwards a stranger doth usurp in their several turns; yet after, when their turns come, every of them may have a *scire facias*

(a) Note; In such case the profits are to the prior, and yet the freehold is in the abbot. 20 Ed. 3. *Non-ability* 9. 14 H. 4. 10. adjudged.

(b) See 13 Ed. 3. *scire facias* 118. Where the conusee of a fine of an advowson brought a *scire facias* at the next avoidance against the heir of the conusor, and held good without shewing any presentment.

(c) He shall have a *scire facias* against the heir at the next avoidance. 39 Ed. 3. 25. But the heir shall not have a *scire facias* on a recovery in a *quare impedit*. 9 H. 6. 57. a. because in the *quare impedit* the presentment only is recoverable, and not the advowson.

upon

16 H. 7. 8.
 &c.

upon this partition against the (*d*) stranger when his turn cometh, to shew wherefore he should not present, notwithstanding the usurpation aforesaid. But otherwise it seemeth it is, if the partition be of record, then they shall be put to their writ of right by reason of this usurpation.

If coparceners make composition to present by turns, **D** (*a*) and a stranger doth usurp, and presenteth in the turn of one of them, yet if they will they may join in a *quare impedit* against the stranger, notwithstanding the composition. And after composition to present by turns, if they do present in common, they may well so do. But it seemeth by that, that the composition is waved; for if coparceners (where one is within age) make composition to present by turns, and at full age they present contrary to this partition, these presentments shall avoid the partition made before.

3 H. 7. 51.

10 Ed. 3. 53.
 10 Aff. 17.

If the eldest son by the first venter present, and dieth **E** without heir, and afterwards the church becomes void, the younger by the second venter shall not present, nor have this advowson. But *Devon* saith, If a man hath two daughters by divers venters, and they enter, and make partition to present by turns, and one dieth without heir, the other sister shall be her heir: *which was granted*. But after the partition, if one sister hath presented, and afterwards dieth without heir, it seemeth her sister of the half-blood shall not be heir unto her.

(*b*) If a man be disseised of a manor unto which an ad- **F** vowson is appendant, and the disseisor suffer an usurpation by a stranger unto the advowson, and afterwards the disseisee doth re-enter into the manor; he shall present unto

(*d*) Yet see the contrary 33 *Ed.* 3. *Quare impedit* 196. which seems not to be law; for there it was brought against an estranger, and held, that though by such usurpation he put the one coparcener (whose turn it was) out of possession; yet it did not put the other out of possession. See 43 *Ed.* 3. 15. 22 *Ed.* 4. 9.

(*a*) *Note*; They may wave the partition of the advowson and the allotment thereon, and present by a new partition. 21 *Ed.* 3. 31. 13 *Ed.* 3. *Quare impedit* 58. 33 *Ed.* 3. *Quare impedit* 196, by *Skipw.*

(*b*) See 24 *H.* 6. 16. 33 *H.* 3. 33. 3 *H.* 4. 7, 8. See also 8 *H.* 6. 17. *a.* 14 *H.* 6. 15. And so it is if a disseisor has presented.

the

the advowson when it doth become void, notwithstanding such usurpation.

Spoliation.

G **T**HERE is a manner of suit called *spoliation*, for the fruits of a church, or for the church itself, which is to be sued in the spiritual court, and not in the temporal court; and therefore there is no writ thereof in the register. But it is good to be known what person shall have that suit, and against what person it will lie, and for what thing he shall sue, and when he shall sue, and in what court.

H *Spoliation* properly lieth for an incumbent against another incumbent, where the right of the patronage doth not come in debate: as if a parson be created bishop, and hath a dispensation to hold (c) his rectory, and afterwards the patron doth present another incumbent, who is instituted and inducted; now the bishop shall have a *spoliation* against that incumbent in the spiritual court, because he claimeth by one patron, and the right of the patronage doth not come in debate.

38 H. 6. 20.
Fortescue.
Infra 51. C.

And so if a parson do accept of another benefice, for which the patron presents another clerk, who is instituted and inducted; now one of them may sue a *spoliation* against the other, and then it shall come in debate, whether he hath plurality or not. But if a patron do present a clerk unto an advowson, who is instituted and inducted, and afterwards another man doth present another clerk to the same advowson, who is also instituted and inducted; there one of them shall not have a *spoliation* against the other, if he disturb him of the church, or to take the fruits thereof, because the right of the patronage doth come in debate in the spiritual court, which of the patrons hath a right for to present: and therefore in that case, if one of them sue a *spoliation* against the other, he shall have a

26 H. 8. 3.

38 H. 6. 20.

26 H. 8. 3.

See after 51.

(c) *Scil.* By force of his former title, and not in *commendam*.

prohibition unto the spiritual court, and no consultation shall be granted for the cause before said.

Post. 37. C.

38 H. 6. 19.
Markham.
26 H. 8. 3.
22 H. 6. 27.

And if one clerk, without any presentation, institution or induction, do cast another person out of his rectory, and taketh the profits thereof, the parson shall not have a *spoliation* against him, but an action of trespass; or an assise of *novel disseisin*; for *spoliation* doth not lie, if not against him who cometh to the possession of a benefice, or unto the fruits thereof, by the course of the spiritual law, *scil.* by institution, &c. so that he have colour to have it, and to be parson by the spiritual law.

So if a prebend happen void, and the bishop collate thereunto, and before induction the bishop die, and the temporalities come unto the king, and afterwards he is inducted, and afterwards the king giveth the same by his letters patent unto another clerk, who is instituted and inducted; the first clerk shall have a *spoliation* in the spiritual court against the presentee of the king, because the king ought to have removed him by *quare impedit*, and not to have collated as he did. And there the patronage doth come in debate.

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M. 44 Ed. 3.
13. Quare im-
pedit 4.

If an abbot have a manor into which an advowson is appendant in fee, and he doth appropriate the advowson to him and his successors, and afterwards leaseth the manor for one thousand years, and also the advowson, and the lessee makes an union of the parsonage and the vicarage, and presents the vicar unto the ordinary as parson, &c. by reason whereof the abbot sueth a *spoliation* against the vicar, and the vicar sueth a prohibition; the abbot shall not have a consultation upon the matter shewed. By which it appeareth, that a *spoliation* doth not lie for the abbot in this case; for that the right of the patronage doth not come in debate.

38 H. 6. 19,
20 28.

And so if an abbot be parson imparsoned, and a stranger present his clerk to that advowson, who is instituted and inducted; the abbot shall not have a *spoliation* against the clerk, but an action of trespass or assise,

assise, if he be ousted; because the right of the parsonage is to be tried.

C And if a clerk obtain a benefice by provision, for which cause the king is to have the presentment for that time, because the very patron did not present within the time limited him by the statute of 25 *Ed.* 3. and the king presents to the church his clerk to the ordinary; who is instituted, and before induction takes the profits; he who is in by provision shall not have a *spoliation* against him, because he doth not come to the possession of the church by the spiritual law, but as an intruder and trespasser. But if the presentee of the king were inducted, then there is no remedy for him who hath the benefice by provision.

D A clerk had a collation by the king unto a chapel, and was put into possession by the sheriff, and afterwards the clerk was ousted by a prior, &c. in that case he shall not have a *spoliation*, but an assise or trespass, &c.

E But it appeareth by the register, that one parson shall have a *spoliation* against another parson, which have divers patrons, &c. if he be spoiled of any tithes or profits appertaining to his church, which do not amount to the fourth part of the value of the church, as before is said. But if they do amount unto the fourth part of the church, then one parson shall not have a *spoliation* against another parson, if they claim not of one patronage, so that the title of the patronage doth not come in debate; and then he shall have a *spoliation*; and if the other sue a prohibition, &c. he shall have a consultation.

Ne admittas.

33 Ed. 3.
Quare impedit
194. Note;
In Marrow's
Reading it is
holden, that the
fix months shall
not be accounted
by 28 days, but
according to the
calendar months.

THIS writ of *ne admittas* lieth for the plaintiff in **F**
a *quare impedit*: and the same is where one hath
an action (*a*) depending in the common pleas of *darrein*
presentment, or of *quare impedit*, and he supposeth that the
bishop will admit the clerk of the defendant pendent the
plea betwixt them; and he may sue this writ directed to
the bishop. And this writ ought to be sued within the
fix months after the avoidance; for after the fix months
he shall not have this writ, because that then the bishop
may present for lapse; and therefore it is in vain then for
to sue this writ, because that the title to present is then
devolved unto the bishop: but the king may sue this writ
after the fix months, where he hath a *quare impedit* de-
pending, or assise de *darrein presentment*, because that *no*
time runs against the king.

But there is a rule in the register, thus; *It is to be*
noted, when the king presents in right of his crown, then time
runs against him. But that is not law at this day.

And the writ of *ne admittas* for the king is such:

The king to the worshipful Father in Christ W. by the same **G**
Grace Bishop of Winchester, greeting: We prohibit you, that
you admit not a parson to the church of I. which is void, as it
is said, and touching the advowson whereof a suit is moved in
our court between us and A. or thus; between A. and B.

(*a*) In *darrein presentment* the plain-
tiff recovered, and the defendant
brought a writ of error, and prayed a
ne admittas to the bishop; but it was
not granted. 17 Ed. 3. 5.

Note; In a *quare impedit* the case
was, *A.* presented to the archdeacon
of *Richmond*, who is the ordinary
there, and *B.* procured a *ne admittas*
to the archdeacon, and especially to
the bishop, who is his superior; after
which the bishop prayed *A.* to appeal
to him, who does so accordingly;

and he inquires by a *jure patronatus*,
and finds *A.* to be patron, and there-
upon admits his clerk. And it seem-
ed, 1. That the *ne admittas* had made
the archdeacon a disturber, if he had
admitted, notwithstanding the *jure*
patronatus found for *A.* 2. That the
ne admittas to the bishop before the
appeal is nothing to the purpose.
3. That the request to the party by
the bishop to appeal to him made him
a disturber, (*quare hoc*) notwithstand-
ing the finding in the *jure patronatus*.

until

until it shall have been discussed in the same court, whether the advowson of the same church belongs to us or to the aforesaid A. Or thus; In the same court to which of them the advowson of the same church belongs: Or thus; Between us by reason of the abbacy of S. being vacant and in our hands, and H. bishop of Lincoln, until it shall have been discussed in our same court, whether the advowson of the same church belongs to us by reason of the vacancy aforesaid, or to the aforesaid bishop.

H And it seemeth that the defendant may sue this writ as well as the plaintiff, if the defendant do suppose that the bishop will admit the clerk of the plaintiff pendent the writ. And this writ of *ne admittas* doth not lie, if the plea be not depending in the king's court by *quare impedit*, or assise of *darrein presentment*. And therefore there is a writ in the Register directed unto the chief justice of the common pleas, to certify the king in the chancery, if there be any pleas depending before him and his companions by writ betwixt such and such persons, &c. And therefore it seemeth the writ of *ne admittas* shall not be granted before the king be certified in the chancery, that such pleas of *quare impedit* or *darrein presentment* be there depending in the common pleas. But yet the writ of *ne admittas* may be granted out of the chancery directed unto the bishop, that he do not admit, &c. before the king be certified in the chancery, that such plea of *quare impedit* or *darrein presentment* is depending in the common pleas, then the party grieved may require the chief justice to certify the king in his chancery, that no such plea is depending there, and thereupon the party grieved shall have such writ:

The king to the worshipful Father in Christ, &c. although by our writ we have prohibited you, that you should not admit a parson to the church of I. (as in the writ of *ne admittas*) nevertheless, because it appears to us by the certificate of our beloved, &c. I. of S. that no plea is depending in our court before him and his companions our justices of the bench, between us and the before-mentioned W. touching the advowson aforesaid; We command you, that you freely execute that which you shall know to appertain to your office in this matter, our prohibition aforesaid notwithstanding. Witness, &c.

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K

And

21 H. 6. 45.

2 Ed. 4. 11.

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And when the bishop himself is party and disturber, **A** then the form of the writ of *ne admittas* is as aforesaid: *We prohibit you that you admit not.* Yet the form of the writ used to be, *We prohibit you, that you collate not a clerk to the church, &c. which is void, &c.*

Breve Episcopo ad admittendum Clericum *.

7 H. 8. 32.

8 H. 4. 22.

A writ shall issue to the metropolitan, if the bishop be party.

Quare, for the bishop did disclaim as patron in 8 H. 4.

IF a man do recover his presentation in the common **B** pleas against the bishop, then he may have a writ to the same bishop to admit his clerk, or unto the metropolitan; and the writ shall be such:

The king to the worshipful Father in Christ, &c. Whereas the prior of I. &c. in our court hath recovered against us his presentation to the vicarage of W. We command you, that you admit a fit person to the vicarage aforesaid upon the presentation of him the said prior, &c.

And if a man recover against another than the bishop, **C** then the writ which shall be made to the bishop, shall be thus:

The king, &c. Whereas the prior of, &c. in our court, &c. hath recovered against I. P. &c. We command you, that notwithstanding the re-claim of the aforesaid I. P. you admit a fit person upon the presentation of the aforesaid prior, &c. And upon that he shall have an alias and a pluries, if the bishop do not execute the writ, and an attachment against the bishop, if need be.

In a quare impedit the defendant disclaims, there the plaintiff shall have a writ to the bishop: *contra* in disclaimer in a writ of right of advowson.

6 Ed. 3. 7.

Error 78. The

reason is, because he cannot remove his clerk after the six months past.

* (*W. W.*) If one pleads in abatement of the writ, and does not make title, he shall not have a writ to the bishop, &c. held by the justices, 43 Ed. 3. 25.

(*M. H.*) Note; This writ is expressly judicial, and therefore shall issue out of the place where the record is; if judgment be given at the *nisi prius*, the justices of *nisi prius* shall award the writ to the bishop; (Yet it

seems this writ is not returnable). And when it appears, that the record is sent into *B. C.* it shall issue from thence. *Dyer* 194.

Note; In a *quare impedit* against the archbishop of York, if he be found a disturber, the writ shall issue to the archbishop of Canterbury to admit the clerk; *per Cur'*. *Dyer* 327, 328. See *Dyer* 76, 77. 19 Ed. 3. *Quare impedit* 153.

But

D But if the king do recover in the common pleas any prebendary, or subdeanery, or dignity against the bishop, and give the same by his letters patent unto another clerk; the clerk shall shew the letters patent in the common pleas, and thereupon shall have a writ unto the bishop to admit him, and to induct him. And if the clerk die before he be admitted and inducted, and the king give the same by other letters patent unto another clerk; that clerk shall have a writ out of the chancery directed unto the justices of the common pleas, reciting the recovery, and how that the other clerk died before he was admitted, and how that he hath granted the same to this clerk by his letters patent, commanding the justices that they send another writ to the bishop, that he admit this clerk, notwithstanding the king's collation before made unto the other clerk.

E (a) In a *quare impedit* betwixt two strangers, if there doth appear to the court a title for the king, they shall award a writ unto the bishop for the king.

11 H. 4. 71.
Hank. and Hill.
21 Ed. 4. 3.

F (b) If a man do recover an advowson, and the six months pass, yet if the church be void, the patron may pray a writ unto the bishop, and shall have it; and if the church be void when the writ cometh to the bishop, (c) the bishop is bound to admit his clerk. And in reason the same law is, if the patron after the six months present unto the bishop, if the church be then void, the bishop is bound to admit his clerk.

14 H. 4. 11.
Hankford.
31 H. 6. 15.
contra where
there is fault in
the count.

G (d) And a *quare impedit* shall be sued against a sub-prior, &c. for disturbance of the patron. *Trin. 31 Ed. 1.*

H (e) Where the writ abateth for form or false *Latin*, the defendant shall not have a writ to the bishop. If the pa-

(a) See accordant 21 Ed. 4. 3. *b. per Choke.* 11 H. 4. 71. *per Hankf.* and so it shall issue, if it be found against the king in a *quare impedit*; and yet if the right appears for the king on a special verdict, he shall not have a writ to the bishop. *Rex versus Episc' Roffen'.* See 4 Eliz. 243. 16 H. 7. 12. F. *Brief al Evesque* 13. Bro. 86. 44 Ed. 3. 10. *Stamf.* 95. a.

Note; On this writ there lies an *alias*, *pluries* and *attachment*, and thereon the parties shall plead, as in a *non admisit.* 2. 121.

(b) *Ante B.* and 35. 11 H. 4. 80.

(c) *Doctor and Student* 125. 13 Ed. 4. 3.

(d) 14 H. 4. 11.

(e) *Vide M. infra*, and 13 H. 4. 7.

7 H. 6. 15.
per curiam,
e contra, if the
patron had ap-
peared, and the
incumbent made
default, in

tron who is defendant make default at the distress, and the incumbent abate the writ by plea, a writ unto the bishop shall not be awarded for the patron, because he made default.

7 H. 6. 37. 14 H. 4. 16. upon pleas of the incumbent, a writ awarded to the bishop.

10 H. 6. 4. f.

(f) In a *quare impedit* against the bishop and others, all made default but the bishop, and the plaintiff had not a writ unto the bishop against the others, until he had counted against the bishop.

33 H. 6. i.

22 H. 6. 44.

1 H. 7. 13.

31 H. 6. 14.

38 H. 6. 14.

34 H. 6. 44.

the third, and others.

(g) If the plaintiff be nonsuit, the defendant shall not have a writ unto the bishop before he hath made title to the advowson. K

Wint. 9 H. 6.

16. per Cur' ;

the plaintiff

shall have a writ

to the bishop

upon insufficient plea. 21 H. 6. 36. Aid. 33 H. 6. 1.

(h) Where the defendant claimeth the advowson as parson imparsonnee, although it be found for the defendant, he shall not have a writ to the bishop. L

(a) Where the writ abateth for *misnomer*, or for insufficiency, the defendant shall not have a writ to the bishop. M

(b) If the defendant do not appear at the distress returned. N

(f) *Vide* 10 H. 6. 4. 11 H. 6. 8. 22 H. 6. 44. 26 H. 6.

(g) See 2 H. 6. 5. 26 H. 6. & *infra* N.

(h) See a writ to the bishop by the defendant, where the plaintiff had discontinued his suit, as if he be essoined, where he had an attorney, &c. 14 H. 4. 12. The writ went to the bishop on a title made where the writ abated. 9 H. 5. 11. If the defendant says he has (no) title to the church within the same bishoprick, he may have a writ to the bishop. *Quære* 8 H. 6. 37. 9 H. 6. 17. A writ went to the bishop on a title made for the defendant, where the writ abated. 11 H. 6. 53. 31 H. 6. 25.

(a) *Vide supra* H. 21 H. 6. 56. 11 H. 6. 3. Where it shall abate for false *Latin*, see 14 H. 4. 11. 3 H. 6. 3. 13 H. 6. 15.

(b) *Vide supra* H. 21 H. 6. 56. 11 H. 6. 3. 27 H. 6. 12.

But if he appears at the grand distress, and after makes default, a *distringas* shall issue, and then a writ to the bishop. 13 Ed. 3. *Brief al Evesque* 19. and although *nihil* be returned on every part of the process, viz. on the summons, attachment and distress, yet the plaintiff shall have a writ to the bishop. 12 H. 4. 4. 21 H. 6. 56. 11 H. 6. 3.

turned

turned against him, the plaintiff shall have a writ to the bishop without (c) making title. *Vide supra* K.

O If the sheriff return upon a *quare impedit*, That the plaintiff hath not found pledges, then the plaintiff may find pledges in the common pleas, and shall have a new *quare impedit* 2 H. 5. 3. in the common pleas; and if the sheriff return upon that writ *tarde*, and the defendant appear, and the plaintiff be called and appeareth not, the defendant shall not have a writ to the bishop, because that no writ is served against the defendant.

P Where the plaintiff recovereth by verdict in a *quare impedit*, 11 H. 4. 80. and it is found by the same verdict that the six months are past, and that the metropolitan hath presented, whereas the ordinary ought to have presented, &c. and that the year is now past, &c. yet the plaintiff shall have a writ to the bishop. See 38 Ed. 3. 12.

Q If a man recover against a bishop, he may have a writ 7 H. 4. 37. to the same (d) bishop, or unto his vicar general, if he be out of the realm, or unto the metropolitan.

R A man sued divers *quare impedit*s against the bishop, 12 R. 2. and he was nonsuit in all but one writ; the defendant had not a writ to the bishop until that writ was determined.

S (e) In a *quare impedit* the defendant pleaded to issue, 2 H. 4. 1. and after made default, and a writ was awarded unto the bishop for the plaintiff.

T (e) At the *distringas* returned against the defendant, he comes, and hath day by the prayer of the parties, and

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(c) And so have a writ of inquiry of damages. 24 Ed. 3. 37. yet see 12 H. 4. where no writ shall issue.

(d) See 16 Ed. 3. *Quare non admisit* 3. But if he has once a writ to the metropolitan, he shall not afterwards resort to have a writ to the bishop, or to the bishop's vicar, if he be out of the realm. 38 Ed. 3. 12. But in that case he has a *sicut alias* to the metropolitan, and yet Note; the bishop was never found a disturber.

See 38 Ed. 3. 22. The metropolitan returned, that it was out of his jurisdiction, and now the plaintiff

prayed a writ to the vicar of the bishop, for that he was out of the realm, and could not have it, because it did not so appear by the certificate.

(e) Note; The defendant came at the grand distress, and pleaded to the inquest. *Contra*, where he comes not at the *Pone per vadios*, &c. 16 Ed. 3. *Brief al Evesque* 18. See 8 Ed. 2. *Quare impedit* 168. 16 Ed. 3. pl. 17. 13 Ed. 3. pl. 19. *Brief al Evesque* 19. See 2 H. 4. 1. according to the diversity.

afterwards makes default; the plaintiff shall not have a writ to the bishop, but a new *distringas*. *Vide supra* N.

(a) In a *quare impedit* the defendant maketh title for himself and others, and afterwards the plaintiff is nonsuit; a writ to the bishop shall be awarded for the defendant only, and not for the others. A

14 H. 7. 19.
and 7 H. 6. 15.

(b) At the distress returned against two, one appeareth, and the other maketh default; the plaintiff shall have a writ to the bishop (c) against him who made default; and yet it may be, that the other defendant may bar the plaintiff; and it is so used at this day: but the contrary was adjudged, *H. 7 Ed. 3.* for the cause before said. B

13 Ed. 3. pl. 20.

In a *darrein presentment* betwixt two strangers, the assise found a title for another stranger; who was not party to the writ; he shall have a writ (d) awarded to the bishop for him, although he were not party to the writ, because that the writ is, *What patron presented last, &c.* C

10 Ed. 3. 19.

Where a man hath a *quare impedit* against one, and the defendant hath a *darrein presentment* against the plaintiff, and recovereth in the *darrein presentment*, and the plaintiff is nonsuit in the *quare impedit*, the defendant shall have two judgments against the plaintiff, to have a writ unto the bishop in both actions; and two writs shall be awarded to inquire of the damages; but he shall not render double damages for one disturbance. D

(a) See 13 Ed. 3. *Brief al Evesque* 25. accordant. See also for this 11 H. 6. 8. *A. B. and C. parceners* brought a *quare impedit* against C. who severed, and afterwards A. and B. were nonsuited; C. shall not have a writ to the bishop without title shewn, and yet on the title shewn, the title would appear for the plaintiff. See 13 Ed. 3. pl. 20 and 25.

(b) See 13 Ed. 3. pl. 21. and *ante*.

(c) See accordant 13 Ed. 3. *Brief al Evesque* 21. *Lib. Entry. Quare impedit* in *Judgment* 4. fol. 507. But a *cesset executio quoad Breve, &c. quousque*. *Vide contra* 7 Ed. 3. 4. (Expressly) in a writ against the bishop

and others; where the bishop disclaims, the plaintiff shall have a writ to the bishop; *sed cesset executio quousque placitum, &c.* See 17 Ed. 3. *Brev. al Evesque* 58. If the king brings a *quare impedit* against B. and another *quare impedit* against B. and C. and B. comes in, *& non potest dedicere*, the first writ to the bishop shall proceed for the king notwithstanding; for it is an original.

(d) See accordant *Bracton* 248. where the assise is taken *per modum assise*, and not *per modum juratæ*. See also accordant 13 Ed. 3. *Brev. al Evesque* 20. by *Aldr.* and 17 Ed. 3. 22. by *Wilby*.

When

E When a man sueth a *quare impedit* against another, and after pendent the suit he sueth *ne admittas* to the bishop, &c. and afterwards they agree to present in common by turns to that advowson; then he shall have a special writ out of the chancery unto the bishop, to admit him who ought, by the accord and composition, to present at the first turn to that avoidance. But first the king ought to send a *certiorari* unto the justices of the common pleas, to certify in the chancery of the accord there; and upon that certificate the king shall send his writ unto the bishop to admit his clerk, who by the accord ought to have the first presentment and turn. And the form of the writ in the register is such:

F *The king to the worshipful, &c. Whereas by our writ we lately prohibited you, that you should not admit a parson, &c. of the same third part of the advowson, and afterwards at the prosecution of them the said E. and M. suggesting to us, that it was agreed between them in this manner, that the aforesaid E. should present his clerk to the said third part for this turn, and the aforesaid M. upon the next avoidance shall present his clerk, as by certain writings indented, made between them, and sealed with their seals, and shewn before us in our chancery, fully appears; and that they have sued unto you, earnestly praying that you, in whose power it is, would admit the clerk of him the said E. for this turn, to the said third part; nevertheless that you, asserting that your hands are tied up by pretence of our said prohibition, have refused to admit the clerk of him the said E. And they beseeching us that we would cause to be provided for them a fit and apposite remedy in this behalf, that the collation of the aforesaid third part for this turn may not devolve to you by lapse of time, which nearly approaches, as it is said; We commanded our beloved and faithful R. of N. that he should thereupon certify to us in our chancery, under his seal, distinctly and openly, the cognizances which the before-mentioned E. and M. willingly made before him, viz. whether they had agreed upon the right of presenting to the third part in manner aforesaid, and if the said M. was willing that the clerk presented by him the said E. to the same third part should, for this turn, be admitted and received to the same, and if the said writings be the deeds of them the said E. and M. And because the before-*

mentioned R. at our command, hath certified that it is agreed between the before-mentioned E. and M. that the aforesaid E. for this present avoidance, shall present his clerk to the said third part, and the aforesaid M. at the next avoidance following, and so the aforesaid E. and M. and their heirs, shall alternately for ever present to the aforesaid third part; and that the said agreement might be firmly observed, the aforesaid writings were made between the parties aforesaid: We command you, that you admit a fit person to the third part aforesaid upon the presentation of the before-mentioned E. for this turn, and that you further execute what belongs to your office in this behalf (notwithstanding our prohibition aforesaid). *Witness, &c.*

40 Ed. 3. 28.
50 Ed. 3. 26.
31 H. 6. 24.

(a) By this writ it seemeth a man shall have a *quare G*
impedit quod permittat ipsum præsentare ad tertiam partem
ecclesiæ; and it seemeth to stand with reason; for a consolidation may be made of three advowsons, and every patron to present by turn, and then every one hath right but to a third part.

Prohibition and Inhibition.

See post. Consultation.

THERE are divers manners of prohibitions and **H**
inhibitions, and they may be directed as well unto the temporal court as unto the spiritual court. And one writ in the Register is, where a man sueth a *præcipe in capite* against another in the common pleas, of lands or tenements which are not holden of the king, but of another lord; then the lord of whom the lands are so holden may sue this writ directed to the justices of the common pleas, commanding them, that if it do appear unto them that the lands are not holden of the king, &c. but immediately of another, that they do not (a) meddle with the
conu-

(a) See the writ in case of a consolidation, where each party has presented by turns; *quod permittat cum præsentare ad ecclesiam*, Dyer 259 and 78. Note; It is there held, that in this case they are not moiety, but

each has the intirety in his turn. But it is otherwise of a composition between parceners. 5 Co. 102. *Windsor's case*.

(a) Where a prohibition shall be in case of an incident plea, if the property

conuſance of that plea, but that they bid the party ſue his writ of right patent, *If it ſhall ſeem expedient to him.* And in a writ of right, if the tenant vouch a foreigner to warranty, the tenant ſhall have a writ of *ſuperſedeas* directed to the bailiffs of the ſame court, to ſurcease the plea, until the warranty be determined; and if the bailiffs will not ſurcease for that writ, then the tenant ſhall have another writ of inhibition directed unto the ſheriff, that he go unto the ſaid court; and inhibit the bailiffs, that they do not proceed in the plea until the warranty be determined, &c. And if they will not ſurcease for that writ, then the tenant ſhall have attachment againſt the bailiffs directed unto the ſheriff, returnable in the common pleas or king's bench.

A A prohibition may be directed unto the ſheriff at the ſuit of the tenant, that he do not hold plea in a writ of right, unleſs battel ſhall be thereupon waged, becauſe that the tenant hath put himſelf upon the grand aſſiſe.

B And a man may have a writ of prohibition directed unto the ſheriff, to go unto the lord's court, and to inhibit the bailiffs, that they do not hold plea in the lord's court of a houſe, &c. *between A. demandant, and B. tenant.* And he may have another writ unto the ſheriff, to prohibit the lord himſelf, that he do not hold the plea, &c.

C And alſo the tenant may have another prohibition directed to the ſheriff, to prohibit the bailiffs of the biſhoprick of the hundred of *F.* that they do not hold plea in the ſaid hundred *between A. demandant, and B. tenant, of cuſtoms and ſervices which the ſame A. requires of him for his free tenement, which he holds of him in I. unleſs battel ſhall thereupon be waged;* becauſe the ſaid *B.* hath put himſelf upon the grand aſſiſe, &c. And if tenant by receipt ſue ſuch a prohibition, the writ ought to make mention of the receipt.

perty of goods comes in debate on a plea for a legacy, mortuary, &c. as if a legacy be deviſed to the heir of *I. S.* ſo that it comes in debate who is heir of *I. S.* yet a prohibition does not lie. *Contra,* if in a ſuit for tithes the bounds of a pariſh comes in debate. *Kelw. 110.*

Where

See Articuli
Cleri 83.

Where the bishop holdeth plea of an advowson, or of D
the fourth part, or of the third part thereof, then the party
shall have a writ of prohibition directed unto the bishop
himself, in this form:

*The king to the worshipful father in Christ A. by the same
grace bishop of Winchester, and his officials and their com-
missaries, greeting: We prohibit you, that you do not hold plea
in the court christian of the advowson of the church of N. or
of the moiety, or of the third part, or of the fourth part of the
church of N. whereof S. and T. complain, that R. draweth
them into plea before you, &c. And he may have a prohibi-
tion to the (b) party himself, Ne sequatur, by these words;
We prohibit you, that you pursue not the plea in the court
christian of the advowson, &c. whereof C. complains, that you
draw him into that court, &c. And he may have an attach-
ment thereupon against him, if he follow it after the writ
cometh unto him.*

And the king for himself may sue forth this writ, al- E
though the plea in the spiritual court be betwixt two com-
mon persons, because the suit is in derogation of his
crown.

And the king may sue an attachment upon the same, F
if they do proceed, &c. And in the time of vacation of
a bishoprick, the prohibition shall be directed unto the
guardian of the spiritualties, and to his official and com-
missaries. And a prohibition lieth for chantries, chapels, G
prebends and vicarages, &c.

(a) If a man sueth another in the spiritual court for a H
chattel or debt, the defendant shall have a prohibition, and
the writ shall be, *We prohibit you, that you do not hold plea
in the court christian of chattels or debts, &c.* And he may
have a writ unto the party himself, that he shall not sue

(b) Note; If the suit be prohibited
by law, and without writ, or if by
writ, and not by law, yet, though he
sues before attachment, a prohibition
lies. 33 Ed. 3. Attachment 14.
8 R. 2. *ibid.* 150. See the writ *Con-
tra pacem*, 31 Ed. 3. Attachment, Sur
Prohibition 8.

(a) In debt on simple contract
against an executor, a prohibition lies,
for there is no remedy for this at
common law against executors. 13
H. 4. 5. per Thirning. 8 Ed. 4. 13.
per Catesby.

there,

there, &c. and shall have an attachment thereupon, if they sue there afterwards, &c. And also the king may sue this writ, and it may be directed unto the judge and party. And the king may have an attachment upon it.

I (b) If a man sueth another in the spiritual court for a lay fee, which is land or tenements, or the like, then he shall have a prohibition, and the writ shall be, *We prohibit you, &c. that you do not hold plea, &c. of the king's lay fee in S. whereof he complains that H. draws him into plea, &c.* And he may have another writ unto the party himself, &c. *That he do not pursue, &c.* and he may sue an attachment upon it; and he may sue an attachment only against the party, or against the (c) judge only, or against both, at the election of the party who will sue. And if the judge do dwell in one county, and the party in another county, then if he will have an attachment against both, he must sue forth several writs. And so it seemeth, if he sue several prohibitions against them, he ought to sue several attachments against them, if he will sue both, although they be dwelling in one county.

15 H. 5. pl. 22.

9 H. 6. 54.
15 H. 5. pl. 22.

K And a man shall have an attachment upon a prohibition against the judge, if he refuse to receive the prohibition, and to admit of it.

(b) But if the bishop himself sues, the writ is good, *Ne sequatur.* 28 Ed. 3. 94. and see there divers join in an attachment on a prohibition, as where they are jointly sued, &c. 14 H. 6. 9.

(c) Where there shall be an attachment against the judge and party by a several *Pone per vad.* see 33 Ed. 3. Brief 912. For the act of the judge is depending on the suit and act of the party, and see there an attachment on a prohibition against the plaintiff and the judge, where the prohibition was only directed to the judge, and held by *Newton* not good. For the plaintiff in the suit there shall

not answer to the contempt, but only to the trespass; because no prohibition was directed to him, and so he cannot be joined in the action. But *Ascough contra*, that the law is in itself a prohibition, and so there needs no mention of any prohibition, and therefore the plaintiff shall answer for the contempt, as in a *præmunire*, &c. which *Norton* agreed, had the prohibition been directed to both of them, and yet this surmise is not traversable. 19 H. 6. 54. a. b. See accordant of the matter of the prohibition, that it is not traversable. 9 H. 6. 61. a. 21 Ed. 3. 29. a. 38. b.

(a) And

V. 11 H. 4. 47.
by which it
seemeth a spiri-
tual thing.
Com. Dig.
F. 7. Tit.
Prohibition.

(a) And a prohibition lieth, if a man be sued in the L spiritual court for the collation unto a grammar school.

If a man sue for trespass in the spiritual court, the king M or the party shall have a prohibition and attachment, as before is shewed, unto the judge or party, or unto them both.

(b) In some cases a man shall have a prohibition when N he is sued in the spiritual court for the tithes of his lands. As if a man be the king's tenant, and holdeth of him in chief by knights service, and is sued in the spiritual court for the tithes of the demesne lands, he shall have a prohibition, because that these lands may come into the king's hands by reason of wardship, or by escheat; and then perhaps the king shall be otherwise charged than he ought to be charged, and therefore the same ought to be tried before the king in his chancery.

No'e; Tithes
sued for in
chancery.

And so if a bishop grant unto a presentee in the church of *Lincoln* the tithes of his demesne lands, to him and his successors; now if the presentor be impleaded in the spiritual court for these tithes, the king may grant a prohibition; and the form is such:

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The king to such a judge, greeting, &c. The worshipful father the bishop of Lincoln hath shewn unto us, that whereas I. presentee in the church of the blessed Mary of Lincoln, holds of his gift all the tithes of his demesne lands, or of his demesne of N. to which the same bishop and his predecessors, bishops of the aforesaid place, have been accustomed to collate, the prior of Saint Katherine without Lincoln claiming those tithes to belong to the church of B. thereupon draws him into plea, &c. And because the aforesaid plea touches our crown

(a) A prohibition was granted to the spiritual court of *Exon*, where a man was libelled against for teaching school without leave from the bishop. *Trin. Nono Annæ in Banco Regineæ*. See *Cox's case* 1 P. Wms. 30. where Lord Keeper *Wright* held that grammar schools, but grammar schools only, were of ecclesiastical cognisance. 2 Lev. 222. acc'. See an argument on this point but no determination,

Salk. 672. But *Qu. Carth.* 484. 2 *Barnard.* 365. 428. *Comb.* 324. See too 19 G. 3. c. 44. s. 2. 31 G. 3. c. 32. s. 13. with respect to Protestant Dissenters and Papists.

(b) See *Rot. Parliament.* 8 Ed. 2. M. 18. in the case of the proprietor of *Twineham* church adjudged *contra*. See *Pos.* 37 Eliz. C. B. in the case of *Sir Edward Wingfield*.

and

and dignity, especially when the collation of the same tithes may devolve to us by reason of wardship or escheat, because also we in our demesnes, and likewise many noblemen of our realm in their demesnes, collate to the like kind of tithes, we prohibit you, &c.

A (c) Also a man may sue a prohibition directed unto the sheriff, that the sheriff do not suffer the king's lay subjects to come to any place at the citation of the bishop, to make any cognizances or perform an oath, except in matrimonial and testamentary causes. And the party may have thereupon an attachment against the bishop, if he cite or distrain any one to appear before him to take an oath at the will of the bishop, against the will of him who is so summoned or cited. And by that it appeareth, that those general citations which bishops make to cite men to appear before them *pro salute anime*, without expressing any cause, are against the law, and the party may have an attachment against the bishop for the same, and may sue a prohibition so to do. And if he do express any cause in the citation, it seemeth by the writ before, that it ought to be for some matrimonial or testamentary cause.

Sec 50. N.

B If a man do acknowledge in the spiritual court, that he oweth another man one hundred pounds, to pay him at a day certain, and after do not pay the same, &c. if he be sued in the spiritual court for this debt, he shall thereupon (a) have a prohibition: and so if he acknowledge in the

8 Ed. 4. 13.

(c) See *Rast. Prohibition*, pl. 6. in appeal, a prohibition formed on *Articulos Cl'ri*, and there it is *ad aliqua recognit' per Sacramentum faciendum*. Without doubt this cannot extend to the depositions of witnesses in another cause of ecclesiastical jurisdiction, and by the recognizances in debt here mentioned in the following sections, must be meant according to the form of the writ in the register next ensuing, fol. 36. and in the five writs there following; so it appears by the writ at large in *Rastal*, that it is intended of an acknowledgment of a debt confirmed by an oath by a volun-

tary agreement and consent of the Lay Gens.

(a) See the foregoing note, and 12 H. 7. 22. 20 Ed. 4. 10. 2 H. 4. 10. 11 H. 4. 88. 38 H. 6. 29. But by the opinion of *Spelman* the court shall punish him *ex officio*. See the case 2 H. 4. 10. where a vicar was sued before the Pope's collectors, that he would not sue for an increase of his portion, and thereupon (being sued for this before the Pope's collectors) a prohibition was awarded. Note; The bond was to pay at the Pope's chamber.

spiritual

Post. 44. A.

spiritual court, that he ought to pay to such a one a hundred marks at such a day, &c. he shall not be sued in the spiritual court for that debt; and if he be, he shall have a prohibition and attachment thereupon. But if a man, by reason of marriage or of a will, do acknowledge in the spiritual court, that he ought to pay a hundred marks, or any other sum, at a certain day; then if he do not pay it according to his acknowledgment, he may be sued in the spiritual court for the same, and a prohibition will not lie (b).

Vide 22. A.
70. Thorpe.

And if a man do acknowledge in the spiritual court to pay a certain debt at a certain day, and do not pay it at the day, for which the other sueth him in the spiritual court, and excommunicateth him there, because he did not pay it at the day; the other party shall have a prohibition against him. C

2 R. Abr. 302.

If a man do recover a debt in the spiritual court against another, and after sue there to have execution; the party grieved shall have a prohibition against the party and the judge, and an attachment upon the same. D

Post. 43. K.

If a man be indebted unto the king, or bounden to render an account unto him, and after his executors are sued in the spiritual court for a debt which doth not concern matrimony or testament; his executors shall have a prohibition against the judge, &c. rehearsing the special matter, &c. 8 Ed. 4. 13. E

Where an abbot or bishop, or other person whatsoever, sueth in the spiritual court, because he taketh toll, or other composition or custom of his tenants, &c. there the party grieved shall have a prohibition against him; or the king may sue this prohibition and attachment thereupon. F

Where a man granteth parcel of his manor to another parson in fee, to be quit of tithes by deed, and the parson with the assent of the ordinary grants unto him, that he shall be quit of tithes of his manor for this parcel of land, &c. if he or his assignee be afterwards impleaded in the G

(b) So if he promises the payment of tithes. 20 Ed. 4. 10.

spiritual court for tithes of his manor, or any parcel of his manor, he or his assignee shall have a prohibition upon that deed; and if the deed were made before time of (a) memory, and so had continued to be quitted of tithes of his manor, he shall have a prohibition, if he be impleaded for the tithes of that manor, or any parcel thereof, upon the matter shewed.

Vide Br. Prescription 603.

H If a man sue any prohibition to any spiritual court, and the judges will not receive the same, or will not allow it, and because he bringeth the prohibition, they make a citation against the party, to answer before them for the same cause; now he shall have a new prohibition upon the matter directed unto the judges there, &c. And also he shall have an attachment thereupon, if they proceed against him in their court. And it is not material, whether the prohibition were sued legally or erroneously, because he shall not be punished for suing a prohibition in the king's court.

I A man deviseth lands in *London* in mortmain, and by reason of this devise the abbot, or he to whom the devise is made, sueth for these lands, or for any parcel thereof, in the spiritual court by colour of the devise: the party grieved by this suit shall have a prohibition.

K If a man sue another in the king's court in trespass for battery, or taking of his goods, and afterwards be nonsuit, and discontinue the suit, for which the defendant sueth him in the spiritual court for defamation, &c. he who hath sued in the temporal court shall have a prohibition against him, and an attachment thereupon, if he sue again in the spiritual court: and also shall have such prohibition unto the judge, and attachment against him, if he hold plea therein after the prohibition delivered unto him.

L Where a composition is made by deed indented at the time of the avoidance of a prior, that an abbot shall nominate six persons, and that the other shall elect one of

(a) *Note*; The consideration is tri- mory. See 16 *Ed. 2. Prescript. 52.*
able, although before time of me- 15 *H. 3. Prohibition 22.*

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them to be prior unto the ordinary; now if he who presenteth be sued in the spiritual court, because he hath presented one unto the ordinary to be prior, he shall thereupon have a prohibition against him who sueth there. And if the sub-prior and convent sue in the spiritual court to avoid such presentment, he shall have a prohibition against the judge, &c.

8 Aff. 28.
Br. Assise 138.
6 H. 7. 14.

And also the king may have a prohibition directed unto the ordinary, that he shall not visit the hospitals which are of the king's foundation, or of the foundation of his predecessors; because that the chancellor of *England* ought to visit them, and no other. And so is it of the king's or his progenitors free chapels, no ordinary shall visit them, but the chancellor of *England*, &c.

6 H. 7. 14.
Keble, vide
8 Aff. pl. 29.
Br. Ass. 138.
8 Ed. 3. 69.
pl. 37.

Where a common person is the founder of an hospital, which is donative by his letters patent, and doth consist all in temporalties, if the ordinary will visit such hospital, the founder shall have a prohibition against him: or if the ordinary will cite any of the poor men to appear before him for an hospital cause, or to remove him, the founder, or his heir, shall have a prohibition. And such hospital may be appendant unto a manor, as well as the advowson of a church.

11 Co. 99.

And if a man recover his presentation by *quare impedit*, and his clerk be admitted and instituted, and another person, who claimeth the advowson by provision from the pope, sue in the spiritual court, for to avoid and remove the other clerk; the patron who hath recovered his presentment, &c. shall have a prohibition unto the judge for to surcease, &c.

So if the king have title to present unto an advowson, by reason of a ward who is in the king's hands, and after the six months past present his clerk, who is admitted and instituted, and the bishop presented his clerk before to the same church for lapse, who was admitted and instituted, &c. by reason whereof the bishop's clerk sue the clerk, who was presented by the king in the spiritual court; the king's clerk shall have a prohibition directed unto the judges, &c. that they shall not proceed in the plea, &c.

If

- E If a man sue a priest or a monk, or canon or clerk, in the temporal law, in debt or trespass, and cause him to be arrested by his body; if they sue for his arrest a citation in the spiritual court *touching the laying of hands upon a clerk by violence*, the other shall have a prohibition directed unto the judge. See the Stat.
9 Ed. 2. Articuli Cleri.
- F (a) If two men are sworn to give evidence unto a jury, and do so, for which certain persons are indicted; if they who are indicted sue them in the spiritual court who gave evidence, for defamation, they shall have a prohibition.
- G Where a man sueth in the spiritual court for spiritual causes, and the defendant purchaseth a prohibition directed unto the judges there, and delivers the same, and for so doing the judges do excommunicate him for the offence he did to the church, in bringing a prohibition to them upon a spiritual cause; the party excommunicate shall have a new prohibition upon that matter, commanding them to revoke the same. For a man shall not be punished for suing forth writs in the king's courts, whether he have right or wrong.
- H If a clerk of the chancery, or any of his servants, or the keeper of the great seal, or any of his servants, or the chancellor, or any of his servants, commit any trespass in *London*, or elsewhere, and are sued for this trespass in *London* before the mayor or sheriff for trespass, they shall have a (b) *superfedeas* directed unto the mayor for to sur-

(a) And so it seems if a feme be sued for defamation for prosecuting a *Homine Repleg'* for her husband. 33 Ed. 3. Brief 912.

(b) But see such *superfedeas* shall not be allowed after imparlance; per *Cur'*. 9 Ed. 4. 53. 20 H. 6. 32. a. 22 H. 6. 7. Yet it shall be after plea pleaded. 11 H. 4. 68. per *Hankford*. Contra 11 H. 6. 8. a. b. But there the suit was in C. B. See 16 Ed. 4. 5, 6. 27 H. 6. 22. & *Dyer* 33, 34. 3 H. 6. 20. If a clerk in chancery and his wife, or

other person, be joined in a suit by writ of trespass or debt in C. B. &c. a *superfedeas* is not allowable for the clerk. But if a clerk of B. R. and another be impleaded in C. B. in trespass, a *superfedeas* for one shall be allowed for the others; for the plaintiff may have his action against all of them in B. R. 14 H. 4. 27, 22. 34 H. 6. 29. b. 35 H. 6. 20. 20 H. 6. 32. a. 10 Ed. 4. 4, 5. *Dyer* fol. ult. a. 2 Lord Raym. 1398. *Salk.* 544.

Vide 4 H. 3.
Prohib. 15.
Vide 43. D.

cease, and bid the party sue in the chancery, if it be need-
ful for him. And there are divers forms of these writs
in the Register; and one writ reciteth, that this custom
and privilege was confirmed by authority of parliament.
Anno 18 Ed. 3.

11 H. 4. 88.

If a woman have title to sue a *cui in vita*, and she swear I
unto the tenant, that she will not sue the *cui in vita*
against him; if she afterwards sue forth the writ, for
which the tenant sueth her in the spiritual court for breach
of her oath, she shall have a prohibition, because the oath
toucheth a temporal thing, *viz.* Land.

If two several patrons present severally to the bishop, K
and thereupon one sueth a *quare impedit* or a *darrein pre-
sentment* against the other, and recovereth, and hath his
clerk admitted, for which the other clerk sueth the clerk
who recovereth by appeal or otherwise, in the archbishop's
court, because that he was not admitted at the present-
ment of his patron; the patron who recovereth shall have
a prohibition directed unto the archbishop, &c. or against
the clerk that sueth there for that cause, that he do not
sue for that cause, &c.

And so it is if the patron be disturbed by the present- L
ment of a stranger, and the disturber's clerk sue the very
patron's clerk in the spiritual court; or contrary, the
clerk of the rightful patron sue the clerk of the disturber
in the spiritual court, he who is grieved shall have a pro-
hibition.

And if the king do collate unto any prebendary, or M
recover the collation unto any prebendary, and his clerk
be admitted, and afterwards the clerk who is vexed sue
in the spiritual court, by means of appellation, or com-
mission, or other cause, by which the title of the collation
may come in debate; the king shall have a prohibition
directed unto the judges where the suit is, commanding
them, that they do not proceed. And if the king do re- N
cover his collation or presentation unto any church, and
after execution of the judgment be disturbed by appeals,
or citations, or other such means; or if that after the
clerk be inducted, the king's clerk be vexed by appeals,
or commissions, or citations in the spiritual court for this
cause;

cause; then the king shall have a writ directed unto all sheriffs, mayors, and other officers, to take and arrest the bodies of those who made such impediments, to disturb the execution of the judgment, or of such presentations or collations made by the king; and also shall have a writ of prohibition unto the bishops and their officers, that they do not any thing in derogation of his presentment or collation, or of the execution of the judgment given for the king. And also the king may sue such prohibition directed unto the party himself who sueth such appeals, provocations, citations, instruments or process, &c. that they do not sue such, or permit such appellations, provocations or impediments to be. And the king shall have an attachment upon that directed unto the sheriff, &c. if the party follow or suffer such, &c. to be sued contrary to that prohibition.

A If the king do recover his presentment unto a church, and hath a writ unto the bishop, &c. to remove the other (a) incumbent, for which the incumbent sueth an appeal in the archbishop's court, &c. by reason whereof the archbishop sendeth a prohibition, that he do not admit the king's clerk pendent the appeal, &c. then the king shall have a writ directed unto the archbishop and his officers to take off his inhibition, and that they do nothing, nor suffer any thing to be done by others, in derogation of the crown or of the king's right; and shall have another writ against the incumbent, that he follow not such appeals, provocations, or other process or impediments. And also the king may have an attachment directed unto the sheriff against such incumbent, if he go on there after such prohibition directed unto him.

B And it appeareth by the Register, that another common person who recovereth his presentment, or hath title to present, shall have such writ of prohibition unto the spi-

(a) And Note; If the party be convicted in an attachment on a prohibition for the king, and he procures an appeal, &c. yet he shall not have the judgment which the stat. 27 Ed. 3. c. 1. gives against those who make default in a *præmunire*; but only that he shall be taken. 30 Ed. 3. 11. b.

ritual judges, or the party, that they shall not proceed, or pursue such, &c. and also attachment against them if they do, &c. And where the king's clerk is in possession by such recovery, and is after disturbed by another with force and arms, that he cannot take the tithes and profits of the church, he shall then have a special commission directed unto the sheriff, and other the king's officers, to take such persons, as well within liberties as without, and to carry them unto the gaol, there to remain till they have other command from the king.

And if the king do recover his presentment, and have C a writ unto the bishop, and his clerk be instituted and inducted; if the bishop at the suit of others have provocations, or other instruments, to cite the king's incumbent to the court of *Rome*, or elsewhere out of the kingdom; then the king shall have a prohibition directed unto the bishop, that he do not cite, nor cause to be cited, such incumbent, &c. and the king may have an attachment upon it, if, &c. And it seems that the king shall have a prohibition without any recovery had before, if his presentee be instituted, &c. And so it seems a common person shall have and sue such a (b) prohibition, when the suit is to try the title of the presentment or collation; yet the writs in the Register are and speak of a recovery.

11 H. 4. 83.
contrary for per-
sonal things.
4 H. 3. Prohi-
bition 15.
See 42. F.
2 Ed. 4. 10.

Ed. 4. 37.

If a man make an oath to infeoff me before such a day, D &c. if he do not infeoff me, I cannot sue him in the spiritual court for breach of his oath, because the thing which is to (c) be done is a temporal act, and shall be tried at the common law, whether he hath done it or not; and therefore if he be sued in the spiritual court for that cause, he shall have a prohibition. And if a man be sued E in the spiritual court, and the judges there will not grant unto the defendant the copy of the libel, then he shall have a prohibition directed unto them for to surcease.

(b) See 22 Ed. 4. 20. 38 H. 6. 24. 11 H. 4. 88. 12 H. 7. 22.

(c) See 2 H. 4. 10. a. b. accordant; and so 11 H. 4. 88. For by *Hankford*, If it be found by a jury, he shall be condemned and awarded

to perform the oath. Note 27 Aff. 70. In a suit in court christian *pro læsione Fidei*, they cannot award one to pay the debt, but only a corporal penance, which he may commute.

&c.

Et. until they have delivered the copy of the libel, according unto the statute made *Anno 2 H. 5.* And also the defendant may have an action against them upon the said statute, if they will not deliver the copy of the libel, whether the cause in the libel be a spiritual cause or not.

A prohibition in this case shall go, though the proceeding be *ex officio.* Lord Raym. 991. Salk. 553. This act is confined to the spiritual courts.

F (a) If a man make a devise of lands or tenements deviseable, the party to whom the devise is made shall not sue in the spiritual court to have the lands or tenements so devised; but if he do, the other party shall have a prohibition. But if he devise goods or chattels real, as a term for years, or a ward; there he may sue in the spiritual court for such things.

Lord Raym. 442. 37 H. 6. 9. 22 Ed. 4. 2. 37 H. 6. 9. Ashton. 46 Ed. 3. 32. 8 H. 8. Prohibition 19. Com. Dig. Tit. Prohibition G. 16. 17. 13 H. 6. Prohibition 3. 4 Ed. 4. 37. 38 H. 6. 14. 12 H. 7. 16.

G If a man sue in the common pleas for trespass, if he sue him in the spiritual court for the same cause, he may (b) shew the matter in the common pleas, and shall have a prohibition from thence directed to the judges, &c. And so always when the matter is depending in the common pleas, if he sue for the same cause in the spiritual court, he shall have a prohibition out of the common pleas.

H But a man shall have a prohibition out of the chancery or the king's bench upon his surmise, surmising that he is sued in the spiritual court for a temporal cause, &c. although he be not sued in the king's bench, or elsewhere, for that cause.

31 H. 8. Br. Prohibition 17. 2 Ed. 4. 11. N. B. ante 31. Bac. Abr. Tit. Prohibition A.

I If a man sue a *quare impedit*, and deliver it of record, as he may, and afterward the defendant, or his clerk, sue a citation against the presentee of the plaintiff; the plaintiff in the *quare impedit* shall have a prohibition in the common pleas before the return of the writ of *quare impedit*, because it appeareth on record that such a *quare impedit* is depending.

2 Ed. 4. 11. V. 18 H. 8. 5.

(a) See 22 Ed. 4. Consultation 5. 8 H. 5. pl. 19. 38 H. 6. 14. 40 Ed. 3. 36. 13 H. 6. Prohibition 3. ante 31.

(b) See 7 H. 4. 1. *Si vero agatur in curia christianitatis tantum modo ex*

officio, and the party has correction, it seems he shall not have a prohibition: *Quere.* See 38 H. 6. 14. *Rast. Entr. p. 484.* 10 H. 6. 21.

Ante 41. G.
8 Ed. 4. 13.

[44]

Vide Com.
350 and 309.
37 H. 6. 8.
45 Ed. 3. 24.
Vide 50. S.
22 Aff. 70.
17 Ed. 4. 4.
15 H. 3.
Prohib. 22.
16 H. 3.
Ibid. 24.
See this ex-
plained by Holt
C. J.
6 Mod. 156.

13 H. 3.
Prohib. 21.
Vide 139.

F. Prohibi-
tion 28.

4 Ed. 3. 27.
29. Prohibi-
tion 2.

If a parson grant to one by deed, that he shall be dis- **K**
charged of tithes of his lands, and afterwards he sueth in
the spiritual court for the tithes, &c. it is said that he
shall not have a prohibition, because he may pretend this
matter in the spiritual court, to discharge him of the tithes.
But if it were upon a composition made before time of
memory, and now the parson sueth for the tithes of those
lands, there he shall have a prohibition against the parson,
&c. *Quære* the diversity, for I think he shall have a pro-
hibition in both cases. The case is *M. 8 Ed. 4. 14.*

If a man promise one ten pounds, if he will marry his **A**
daughter; if he marry the daughter, and the other will
not pay the money, he shall not sue for the same in the
spiritual (c) court. But if he promise one with his
daughter in marriage ten pounds, &c. if he do marry the
daughter, and he do not pay the money, he may sue in
the spiritual court for the ten pounds, because it con-
cerneth matrimony. Which diversity see in *22 Ed. 3.*
Lib. Aff.

(a) If the testator charge his executors to pay his debts **B**
to his creditors, if they do not pay them, the creditors
may sue in the spiritual court; and they shall not have a
prohibition, for that this charge of the testator is as a de-
vise unto his creditors: *Quod vide H. 9 Ed. 3. Prohibi-*
tion 17.

(b) If a man give goods in marriage with his daughter, **C**
and afterwards they are divorced; the wife may sue in the
spiritual court for the goods, and no prohibition will lie
thereof.

If a stranger do disturb the executors to perform the **D**
will, they may sue him in the spiritual court, and no *prohi-*
bition lieth against them for so doing. *T. 4 H. 3. Prohi-*
bition 28. acc.

If a man sue a prohibition because another draweth him **E**
into the spiritual court for an advowson of a church, &c.

(c) See the case of *Josline and Shel-*
ton, 4, 5 *Ph. & Mar. & 33 Ed. 3.*
Jurisdiction 25. Post. 58. S. 14 Ed.
4. 6. 17 Ed. 4. 4. b. 15 Ed. 4.
32. a.

(a) 7 *Eliz. 305. Bro. Debt 135.*
22 Ed. 3. Aff. 70.

(b) 26 *H. 8. 7. 13 Ed. 3. or H.*
5. 13.

upon

upon the attachment upon the prohibition sued he may declare, that he did deforce him of great and small tithes, &c.

F If one parson sue another parson in the spiritual court for tithes of the profits arising in one hundred acres of lands within the bounds and limits of his parish being, for which the patron of the other parson purchaseth an *indicavit* unto the spiritual judge for to surcease, &c. then may the parson who sueth in the spiritual court come into the chancery, and have a writ unto the bishop for to inquire of the value of the church, according to the tax of tithes now current, as upon the value of the tithes demanded, and to certify the king in the chancery thereof by letters under his seal, with the writ: and it seemeth he ought so to do before he have a consultation granted in that case. Post. 45.

G If a bishop will cite or compel the king's chaplains, or the masters of the chancery, who are the king's chaplains, to make their personal residence upon their benefices when they are attending in the king's service, they may have a prohibition unto the bishop, &c. and upon the same an *alias*, *pluries* and attachment. But if they be not attending in the king's service, then the ordinary may compel them to make personal residence upon their benefices; and the form of the writ is such:

The king to the worshipful, &c. Whereas our clerks, while they continue in our service, ought not to be compelled to keep residence personally upon their benefices, or to be otherwise disquieted or molested hereupon; We and our progenitors, formerly kings of England, having always, from time out of mind, hitherto used these liberties and privileges for our clerks, command you, that you in no wise compel our beloved clerk, parson of the church of B. &c. who by our command continually attends our service in our chancery, to personal residence upon his benefice, while he stays in our same service, &c.

And if the king's chaplain be chosen dean of any church, which office requireth personal attendance and residence, and the bishop will compel him to take the deanery which requireth that personal residence, by spiritual censures and citations, &c. then he shall have a pro-

hibition unto the bishop by these words: *We strictly prohibit you, that you by no means whatever compel him the said A. to keep any residence on his benefice, or to take upon him the duty aforesaid, or require any thing for residence of this kind, while he so attends our service aforesaid; and if any thing in the fruits, or other goods of the church of our said clerk, have been put under sequestration upon that occasion, by him the said bishop or his, you cause the same to be released without delay, &c.* And so if the clerk abide in the king's service in the company of our beloved and trusty R. of P. in the parts of Gascony.

And so if the bishop will amerce the king's chaplains, and compel them to pay a certain sum of money for non-residence, they shall have a prohibition.

Vide Stat. Articuli Cleri, cap. 2.

If one sue another out of the realm for debt, or other cause, whereof the king's court may have conusance, he shall have a prohibition against him, and an attachment upon the same, if, &c. And so if one clerk sueth another upon the title of collation of any prebendary out of the realm, &c. he may have this prohibition: and the king may send a writ to him who is so sued out of the realm, commanding him upon pain of forfeiture of so much as he may forfeit, that he go not out of the realm for to answer thereunto, whereof the conusance doth appertain unto the king's court. And also the king may send unto the prebend, if he be sued out of the realm for title of the prebendary, to prohibit him upon pain of imprisonment and of forfeiture of what he may forfeit, that he do not go out of the realm, nor answer there by his proctor or otherwise, &c.

[45]

And if any man do purchase from the court of Rome any citation against any clerk or others, directed unto the archbishop of Canterbury, or unto others, to cite such persons to appear before the Pope, &c. and to answer for the collation or presentation unto any benefice or prebendary; then the king shall send his writ of prohibition unto the archbishop, or other to whom such process is directed, that they do not cite, &c. and may have another prohibition to the party himself, and an attachment upon the same, &c.

And

A And when a consultation is once duly granted, then the cause may proceed in the spiritual court, notwithstanding that the party purchase a new prohibition directed unto them, if the libel be not changed: *quod vide* by the statute of 50 *Ed. 3. c. 4.*

In what instances prohibition shall go after consultation.

See Com. Dig. Tit. Prohibition K. 4.

B The writ of prohibition, which is called *indicavit*, most commonly lieth between four persons, whereof two are patrons and two are clerks, and properly lieth where one clerk sueth another in the spiritual court for tithes, which do amount unto the fourth part of the value of the church at the least; for if it doth not amount unto the value of the fourth part, but unto the fifth part, the *indicavit* doth not lie. And this writ lieth for the patron, and that clerk who is sued in the spiritual court: and this writ may be sued as well against the judge as the party. And the king may sue this writ where his clerk is impleaded for tithes amounting to the value of the fourth part of the church, or of the church itself. And this writ of *indicavit* lieth as well for the patron, where his clerk is impleaded for the advowson itself, or such vicarage, prebend or chapel, as well as if he were impleaded of the tithes of the church, vicarage, prebend or chapel.

Indicavit, ante 44.
Supra 30.

And it appeareth by the Register, the writ of *indicavit* which the king shall have where the clerk is impleaded in the spiritual court for tithes, not making mention what is the value of the fourth part, is such:

The king to the official of the bishop, &c. and to his commissaries, greeting: Whereas A. of B. parson of the church of W. holds all the tithes farth-coming of the marsh, &c. of our advowson, the abbot of Battel claiming them to belong to his church of, &c. draws him into plea, &c. We prohibit you, &c. whether the advowson of the same tithes belongs to us or to the aforesaid abbot, because pleas, &c. And this writ of indicavit ought to be sued by the patron before judgment given in the spiritual court, for after judgment given there, the indicavit is void.

C And a man shall not have an *indicavit* before the party in the spiritual court hath libelled there against the defendant; and the party who sueth the *indicavit* ought to shew the copy of the libel in the chancery, before he have the

Supra 30. G.

31 H. 6. 13.

the *indicavit*. And when the party hath libelled in the spiritual court, and the party is put to answer, then it is called and said, that the suit is contested in the court of christianity.

4 Ed. 3. 20.
29. Prohibition 1.

And *indicavit* lieth for tithes and offerings, if suit be in the spiritual court for them, as well as it lieth of an advowson; and that for a common person, as well as for the king. And the writ of *indicavit* shall not mention, that the tithes and offerings which are in suit do amount unto the fourth part of the church, but *the tithes forthcoming of one hundred acres of land*, or of such a manor: and if these tithes be not to the fourth part of the value of the advowson, the other party may alledge and surmise the same, and have a consultation. D

And also *indicavit* lieth, where one party is parson imparsoned, and the clerk of the other patron sue him in the spiritual court for tithes, &c. he may sue the *indicavit*. And so if an abbot be parson imparsoned of a church, and another abbot be parson imparsoned of another advowson, and one sue the other for tithes appertaining to his advowson, amounting unto the fourth part of a church, &c. the other shall have the *indicavit* against him. E

And if an abbot be parson imparsoned of an advowson, and have a vicar endowed; then, if the parson be sued in the spiritual court for the fourth part of the tithes of his parsonage, he shall have an *indicavit*. And so if the vicar be sued for the fourth part of the tithes and offerings of his vicarage, the parson, or he who is patron of the vicarage, shall have the *indicavit*, because they are several advowsons; the parsonage one, and the vicarage another; and there may be divers patrons of them. *Quod vide Pasch. 31 H. 6. in title Indicavit. See West. 1. cap. 35.*

If bailiffs, mayors, or others, who claim jurisdiction to arrest a man upon a plaint before them, or to attach his goods, &c. do arrest one for trespass or contract, who was not within their jurisdiction, the party arrested, &c. shall have a prohibition directed unto them, &c. and the form is such: F

The

The king to his bailiffs A. of N. Whereas it is provided by the common council of our realm, that it may not be lawful for any of the same realm, except for us and our ministers, having special authority for this purpose, to attach any persons passing through his bailiwick or dominion, to answer any person upon contracts, covenants or trespasss made out of the same bailiwick or dominion; we command you, that you do not attach B. to answer any person before you in your bailiwick upon contracts, covenants or trespasss of this kind, contrary to the form of the provision aforesaid; and if you shall have made any distress thereupon, that you cause the same to be delivered, &c. And if they will not obey the same, he shall have an attachment against the bailiffs. And this writ lieth as well upon attachment of goods, as for arresting of the body.

G *If a woman have lands which she holdeth in dower, or of joint purchase with her husband, or of her own inheritance, if the sheriff have process out of the exchequer to levy the husband's debts which he oweth unto the king; or if the sheriff have process out of another court to levy debts due by her husband to another person; if the sheriff will distrain in the lands which the wife holdeth, &c. the wife shall have a writ unto the sheriff, that he do not distrain the wife who holdeth such lands, in the same lands, for the debt of the husband; and the form of the writ is such:*

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The king to the sheriff, &c. Whereas according to the law and custom of our realm, women ought not to be distrained in the lands and tenements which they hold in dower of the gift of their husbands, or which are of their own inheritance, or which they have purchased to themselves, for paying the debts of their husbands; and you, as we are informed from her heavy complaint, do distress B. who was the wife of A. in her lands and tenements which she holds in dower of the gift of the same A. and also which were of the inheritance of her the said B. and of the purchase of her the said B. We command you, that you do not distrain or cause to be distrained her the said B. in her lands and tenements which she holds in dower, or which are of her own proper inheritance, or of the purchase of her the said B. for the paying of the debts of the aforesaid A. some time her husband,

husband contrary to the law and custom aforesaid, &c. and the distrefs, if any, &c.

And there is such a writ unto the sheriff, where process cometh unto the sheriff out of the exchequer, to levy the debts of the husband, *per summ' Scaccarii*, &c. And in that case she may sue a writ unto the barons of the exchequer, that they surcease to make out such process to the sheriff to distrain the wife in such lands, &c. Another form of writ unto the barons of the exchequer, to surcease to distrain the wife, &c. and with a proviso in the same writ, that they levy the debts of the husband's executors, or of his heir, or of the lands and tenements which were the husband's, &c.

And if a man sue another in the county court for debts A
(a) or chattels, which do amount to the sum of forty shillings; then the party shall have a prohibition against him who is sheriff, that he shall not hold plea thereof, and that he tell the party that he sue in the common pleas; and the writ is such :

The king to the sheriff, &c. Whereas pleas of chattels and debts which amount to the sum of forty shillings, or exceed it, according to the law and custom of our realm, ought not to be pleaded without our writ; and as we hear A. hath impleaded B. touching a debt of one hundred shillings in your county without our writ; we command you, if it be so, that then you absolutely supersede that plea from being further holden in the county aforesaid without our writ, and on our behalf that you tell the aforesaid A. that he may upon request obtain our writ of the debt aforesaid against the aforesaid B. if it shall seem to him expedient. Witness, &c. And if such writ be sued in another court, then the writ shall be directed unto the bailiff of the court, in such form :

The king to his bailiffs I. of N. or to his bailiffs of N. greeting: Whereas pleas, &c. (as above, until) without our writ; and as we hear A. impleads B. for this, that the same

(a) And so if he split an entire contract into several sums under forty shillings. See 19 H. 6. 54. it seems the judgments for such sums are *coram*

non judice, and void; at least, voidable by false judgment. *Kelw.* 106. a. See 19 H. 6. 5. a.

B. may render to the aforesaid A. chattels to the value of ten pounds, before us in the court of your said lord of N. or in our court of N. without our writ; we command you, if it be so, that then you wholly supersede that plea, &c. (as above). And if they do not surcease upon this writ, then he shall have an *alias* and *pluries*, and an attachment against them, and also an attachment against the party himself.

And if a man do owe unto another man five marks, and he sue several complaints for the same in the county court, or in any other court against the debtor, he shall have a prohibition thereof, and rehearse the matter, and that he would defraud the king's court of its jurisdiction, and also the party of his answer, &c. commanding them that they do not proceed, &c. and that he command the party to sue at the common law in the king's court; and if they will not surcease, he shall have an *alias* and *pluries*, and *attachment* upon the same, &c.

And so it is if a man will sue in the county court a writ of covenant or trespass, unto his damage of forty shillings or more, the party shall have a prohibition for to surcease, and thereupon an *alias*, *pluries* and *attachment*, &c.

And so if the executor sue in the county, or in a court baron, for a debt of five marks by divers complaints, whereas the debt is upon a contract, or upon an obligation; now the defendant may shew the same, and plead unto the jurisdiction of the court, or he may have a writ of prohibition directed unto them, that they do surcease, &c. and if he have judgment in any of the complaints sued for parcel of the debt, yet in the prohibition he may prohibit him in the complaints which are depending, and that execution of the judgment cease for the residue.

See 15 H. 3.
Prohibition 13.
contr.

And also if a man sue in the county a complaint of twenty pounds, and have judgment to recover in that court; yet the defendant may sue a prohibition, commanding the sheriff and the suitors that they do not execute the judgment, although he have before admitted the jurisdiction.

And so after judgment given, and execution awarded in the county, or in other court baron, which hath not power to hold plea of debt of the sum of forty shillings,
&c.

Ec. or of damages in trespass amounting to such sum, or more, the party defendant shall have a writ of prohibition unto the bailiffs, or unto the sheriff or officer of the court, that they do not execution; and if they have distrained the party to make satisfaction, that then they release the distress, and that they revoke what they have done therein.

There is a rule in the Register thus: *If pleas of chattels or debts which amount to the sum of forty shillings, or exceed it, are pleaded in the county or in other court without our writ, which is wanting, let not therefore a writ of false judgment, nor recordare, nor a writ of executio judicii, be made, except in courts of cities, and other courts which have jurisdictions of this kind, according to custom.* H

[47]

1 Ed. 4. 15.
Justices lieth
without Vi &
Arm. Little-
ton.

And if a man sue another in the county, or other court, upon a plaint of trespass *vi & armis*; the defendant may sue a prohibition unto the sheriff, or unto the bailiff, in such form: A

The king to the bailiffs of B. Ec. Whereas pleas of trespasses done with force and arms against the peace in our realm of England, ought not to be pleaded without our writ, according to the law and custom of the same realm; and as we hear W. hath impleaded R. of T. before you in the court of your aforesaid lord, of divers trespasses done to the same W. by the aforesaid R. with force and arms against our peace (as it is said) to the great damage of him the said W. and contrary to the law and custom aforesaid: We command you, if it be so, that then you do wholly supersede the pleas aforesaid from being further holden before you, telling the aforesaid W. on our behalf, that he may upon request obtain for himself our writ of trespass aforesaid against the aforesaid R. if it shall seem expedient to him. Witness, &c.

And if one man sueth another in a court baron, or other court which is not a court of record, for charters concerning inheritance or freehold, he shall have a prohibition, and the form is such: B

The king to the bailiffs of R. of P. greeting: Whereas pleas of detainue of charters or writings touching freehold ought not to be pleaded in any courts which are not of record, without our writ, according to the law and custom of our realm;
and

and E. hath impleaded W. before you in the court aforesaid of your lord of P. without our writ, for this, that the same W. render to the aforesaid E. three charters, as we hear: We command you, if it be so, that then you do wholly supersede that plea from being further holden before you in the court aforesaid without our writ, and that you tell the aforesaid E. on our behalf, that he may upon request obtain for himself our writ of detinue of charters aforesaid against the aforesaid W. if it shall seem expedient to him. Witness, &c. in the eighth year. This writ was ordained by the council at York.

Quare non admisit.

C IF a man do recover an advowson, and have a writ unto the bishop to admit his clerk, and he will not admit him; then the party may sue an *alias* and *pluries*, or attachment, &c. or may sue a writ out of the chancery, or out of the common pleas, at his election, *de quare non admisit*, as well in the term-time as in the vacation; but the best is in the term-time to sue in the common pleas: and in this writ it behoveth him to certify the recovery. And the form of the writ of *quare non admisit* for the king is such:

See 12 Ed. 3.
Quare non admisit 6.

The king to the sheriff, &c. Summon, &c. A. bishop of Winchester, &c. that he be before us such a day, &c. where-soever, &c. Wherefore, when we lately in our court before us had recovered, &c. And he shall not say in the writ, If the king shall make you secure, because the king shall not find pledges, &c.

Infra 101. A.
acc.

D And if the king do recover his presentment in the common pleas, yet he may sue a *quare non admisit* in the king's bench before himself.

Supra 32. F.

E And so if a common person do recover in a *quare impedit* in the common pleas, and the record is removed by a writ of error into the king's bench, and there affirmed; then he shall have a writ unto the bishop there, and ought to sue *quare non admisit* against the bishop there upon the record, otherwise not. After the record removed by a writ

Infra 48. E.
acc.

writ of (a) error, the plaintiff who recovered shall not have *quare non admisit* until the judgment be affirmed in the king's bench.

38 H. 6. 14. b.

And the *quare non admisit* ought to be sued in the county F where the bishop refuseth the plaintiff's clerk.

And in the *quare non admisit* he shall recover only damages, and shall not have his clerk admitted by this writ. G

And if the bishop hath admitted and instituted him, H and the archdeacon will not induct him; he hath no remedy but only in the spiritual court, as it is said; for it is a good plea for the bishop to say, That he admitted the clerk, and sent his letters unto the archdeacon who will not induct him. And I conceive that if the archdeacon refuse to induct the clerk, that the clerk shall have an action on the case against the archdeacon, because the induction is a temporal act. As if the sheriff upon *Habere facias seisinam* will not admit him into possession, he shall have an *alias* and *pluries* (b) and attachment against him. But some have said, that he shall have a citation against the archdeacon in the spiritual court, and punish him there; for perhaps he may alledge a special cause, for which by the spiritual law he ought not to be inducted, which cause cannot be determined in the temporal court. *Ideo quære.*

Fortesc. Rep.
291.

38 H. 6. 16.

And if the vicar-general do refuse to admit the clerk, I the *quare non admisit* shall be brought against the bishop for that refusal; and if the bishop do refuse the clerk, and afterwards dieth, *quare non admisit* is maintainable

V. 21 H. 7. 3.
A man recovered in a *quare* impedit, and had a writ to the bishop, who re-

turned, that the clerk who was in had resigned, and that the church was full of the presentment of J. H. and upon that return the plaintiff had a *scire facias* against the bishop: and after the return the opinion of the court was, That he should have *quare non admisit*.

(a) One defendant shall not haveoyer of the record; *vide hic* 48. F. 16 Ed. 3. *Quare non admisit* 3. But by *Hill*, if the record be in another place, the justices shall surcease till they have inspected the record. See accordant 17 Ed. 3. 55. by *Shard*, in a *quare non admisit* in the rolls. For the reversal of the first judgment

is a reversal of the second. See 26 Ed. 3. 35. *contra*, & *quære hic*, if it be a new original. Note also 26 Ed. 3. 75. accordant.

(b) See 13 Ed. 3. *Quare non admisit* 4. and 9 Ed. 3. *ibid.* 13. a *quare non admisit*, against an official. *Alioquin Rex se capiet ad illum.*

against

against the guardian of the spiritualities for this refusal made by the bishop. *Tamen quare.*

K (a) The bishop is not bounden to admit the clerk, if the church be full of the presentment of another party who is not party to the recovery.

L If the bishop do refuse the king's presentee, and doth afterwards admit him, yet the king shall have *quare non admisit* against him for that refusal; and so shall a common person in like manner have, as I conceive.

M In a *quare non admisit* the bishop may say, that he did present for lapse.

N And *quare non admisit* was maintainable against the bishop's official. *Mich. 9 Ed. 3.*

A If a man do recover in a *quare impedit* his presentment unto a chapel which is donative, then I think that he shall have a writ unto the sheriff to put the clerk who recovered into possession (b).

[48]

B And in a *quare non admisit* the bishop may say, that the church is litigious betwixt two, &c.

C If a man hath a donative chantry, which is of the nature that one name unto another his clerk, and that the other shall institute and induct him; there if he who hath the nomination be disturbed, he shall have a *quare impedit*, and if he do recover, he shall have a writ unto him who ought to instal and induct him, to put him in possession. But if he be disturbed by him who ought to instal him, then he ought to have a *quare impedit* against him: and after that he hath recovered, he shall have a writ to him who disturbed him, to put his clerk into possession; or he shall have a writ unto the sheriff, to put the clerk of him who recovered into possession, at his election.

That is between the plaintiff and a stranger, but not between the plaintiff and defendant, for the recovery determines the matter between them, of which the bishop is to take notice.

34 H. 6. 41. b.

(a) And Note; The bishop shall be excused, if he return the (whole) matter on the writ, *ad admittendum clericum*, whereupon the party may have a *quare non admisit* against the bishop, to try the truth of the return, and also a *scire facias* against the incumbent to try his title. 9 Eliz. Dyer 260. a. *Basset's Case.*

Also, if the bishop be inhibited by the archbishop to admit the clerk, he shall be excused, and a writ shall issue to the president of the arches. *Parl. 22 Ed. 3. n. 63.*

(b) See 14 H. 4. 11. accordant, by *Hankf.* of a free chapel, which one has by the king's grant.

Quare incumbravit.

QUARE *incumbravit* (a) ought to be sued in the D county where the church is, because the wrong is done here.

17 Ed. 3. 74.
Supra 32. E. 47.
D.

And *quare incumbravit* doth not lie but where the E plaintiff recovereth by judgment of court. And the king may sue a *quare incumbravit* in the king's bench, although the record of recovery be in the common pleas; but a common person cannot do so.

17 Ed. 3. 74.
for all.

(b) And *quare incumbravit* may be sued in the common F pleas, although the record be removed in the king's bench by a writ of error, or in the treasury; but if the record be in the king's bench, it seemeth then that the party shall sue the *quare incumbravit* there, &c.

And *quare incumbravit* is an original writ, and shall G issue out of the chancery, and not out of the common pleas.

And *quare incumbravit* doth not lie until the party hath H sued the writ of *ne admittas* (c) unto the bishop; for if the bishop do incumber the church before the writ of *ne admittas* sued, then the party shall have a *quare impedit*, and

(a) *Per Thorp.* If the bishop incumber where no debate or dispute is, yet this writ lies. 17 Ed. 3. 74. b. 21 Ed. 3. *Quare incumbravit* 3. and so by *Wilby*, if the bishop incumber within the six months, though no plea be pending, 18 Ed. 3. 17. b. which was admitted by *Hill* and *Pole*, and that there shall be a special count, and not of a recovery.

(b) In a *quare incumbravit*, *per Thorp* & *Green* adjudged. 1. That one shall have Oyer of the record. 2. That one shall have this writ before judgment. 3. That the writ shall be returnable in the same Court where the original judgment was given. 4. Where the writ supposes the plea pending touching the church, it is good. 5. That the writ shall not

make mention of the place where the recovery was had. 6. It need not mention whether he incumbered within or after the six months, but that shall come by way of answer. 7. If one recover within the six months, and the bishop incumbers, he shall have a *quare incumbravit* within the six months. 8. It is no plea that the record is removed by error. 17 Ed. 3. 50. 54. 74. or that he has received the plaintiff's clerk at his nomination. 21 Ed. 3. 3. a.

(c) *Note*; The issue in that case shall not be on the day that the prohibition was delivered, but whether he received the clerk before the prohibition delivered or not. 19 Ed. 3. *Quare incumbravit* 2.

not *quare incumbravit*; for the bishop cannot have notice until the *ne admittas* be delivered unto him. And if the (d) bishop, after the *ne admittas* delivered unto him, do admit his clerk for whom it is found by the *jure patronatus*, yet the other party shall have *quare incumbravit* against him. (e) And in *quare incumbravit* he shall have judgment to recover damages, and also his presentment. But so shall he not have in *quare non admisit*, but only damages. Ant. 35 G.

K. (a) And in 21 Ed. 1. it was adjudged, That a man shall have a *quare incumbravit* without making mention of any recovery in the writ, or in the count. But by the rule of the Register he ought to mention the recovery; and that seems to be the better opinion. 34 H. 6. 39.

L. (a) And after the *ne admittas* delivered, if the six months pass, the bishop may present his clerk for lapse, and shall not be charged by the *quare incumbravit* for that presentation; but it seemeth he cannot admit the clerk

(d) See accordant 19 Ed. 3. *Quare incumbravit* 2. 18 Ed. 3. 17. And the reason is because the patron need not shew the right of patronage to be in him, for the *ne admittas* with the recovery gives him the action, though he be not the true patron. See 8 R. 2. *Quare impedit* 159. a *quare impedit* lies in such case, although he has not presented to the same avoidance. 17 Ed. 3. 75. Also the plaintiff need not count that the bishop refused his clerk, for the *incumbravit* is a refusal. 18 Ed. 3. 17. b.

(e) See 21 Ed. 3. 3. accordant; but his temporalities shall not be (seized) at common law.

(a) A *quare incumbravit* was brought by the tenant of one Audley against the bishop of Exeter, and counted that the church avoided the 13th of April, by the death of I. S. and that debate arose between him and William Champenoon, and that the plaintiff recovered in a *quare impedit*, and that pending that suit, he delivered to the

bishop a prohibition at such a place, and that the bishop incumbered within the six months; the bishop pleads and shews, that the *quare impedit* bore date the 9th of April, and so was brought in wrong to the incumbent; *sed non allocatur*. For suppose it was brought, living the patron, if the parson dies pending the plea, and the bishop incumber it, and afterwards the plaintiff recovers, a *quare impedit* lies. Whereupon the bishop taking no notice of the prohibition served on him, pleads, that the church had been void twelve months, and that six months passed before the recovery, whereby the bishop presented as ordinary, *absque hoc*, that he incumbered within the six months, and resolved that what is said of the time of the avoidance shall not go to the incumbrance; wherefore Pole, &c. took issue, whether he incumbered within six months after the avoidance, &c. 18 Ed. 3. 17.

of the other man after the six months past, for that shall be against the writ of *ne admittas* delivered unto him. And also if the bishop do present the clerk of the other party after the six months, who had presented unto him before, that presentment maketh title to the party, although it be after the six months; by which it seemeth that the *quare incumbravit* lieth then for the party.

M. vide accordant 19 Ed. 2.
Quare incumbravit 2.

And if the plaintiff be nonsuit in *quare incumbravit*, he M may sue a new *quare incumbravit*, and may vary from his count upon the first writ. And it is a good issue, that N he did not incumber, &c. after the prohibition delivered unto him.

And if a man hath a *quare impedit* depending, and he O sue a *ne admittas* to the bishop, and afterwards the bishop do incumber the church within the six months with his chaplain, or with the defendant's chaplain, then the plaintiff shall have *quare incumbravit*; and the form of the writ shall be such:

The king to the sheriff of Lincolnshire, greeting: If A. shall make you secure, &c. then summon H. bishop of Lincoln, that he be before our justices, &c. to shew wherefore, when the same A. in our court (b) before the justices aforesaid, by the consideration of our court aforesaid, had recovered his presentation to the church of I. against B. yet the same bishop, pending the plea in the aforesaid court before the before-mentioned justices, hath incumbered the same church, to the no little damage and grievance of him the said A. and contrary to the law and custom of our realm: And have you there, &c. Witnesses, &c.

And if he do not appear at the return of the writ of P *incumbravit*, nor at the *alias*, then the *distringas* shall be in the end, *In manifest contempt of us and our commands, and to the manifest weakening the consideration of our court: And have there, &c.*

And if a man hath a writ of right of advowson de Q pending betwixt him another, and the church void pen-

(b) And Note: This writ has been 3. 17. in the case *supra* of *H. de Audley*.
adjudged good, without saying before what justices he recovered. 18 Ed.

dent the writ, the plaintiff shall not have *ne admittas* to the bishop, nor the writ of *quare incumbravit*, although the bishop incumber the church; for the demandant shall not recover the presentment upon this writ, but the advowson; and if he hath title to present, he may present, and have a *quare impedit*, if he be disturbed.

Juris utrum.

R *JURIS utrum* is a writ of the highest nature that a parson can have; and he shall have this writ where the lands or tenements are aliened by his predecessor, or if a recovery be had against the predecessor by default, or by reddition, or for want of pleading of the predecessor, where he hath not prayed in aid of the patron and ordinary. But if he do pray in aid of the patron and ordinary, and they join in aid, and render the land, or confess the action, then the successor of such a parson shall not have this writ against that recoveree: and also if a man recover by action tried against a parson's lands or tenements, by verdict, and the parson doth not pray in aid of the patron and ordinary, yet his successor shall have a *juris utrum*, and shall not be put to a writ of attainr. *Post. 50. D.*

A And if a man intrude into lands and tenements after the death of a parson, the successor shall have this writ of *juris utrum*: and so if a parson be disseised of lands and tenements, parcel of his rectory, and dieth, his successor shall have a *juris utrum* (a).

B And also a parson may have an assise of lands or tenements of his rectory, or a writ in the *quibus*, in the nature of an assise, or a writ of entry in the *per* or *cui*, or in the *post*, upon a disseisin made to himself, but not upon a disseisin made to his predecessor, but shall be put to sue a *juris utrum*, &c. 20 *Ed. 3. Juris utrum 5.*

[49]
19 H. 40.
Fortescue.
If annuity be recovered against a parson, his successor shall not have *juris utrum* upon that recovery, for that nothing is taken out of the possession of his successor; but a charge only upon the successor which shall bind him.

(a) See 26 H. 8. 3. 33 *Ed. 3. Ayl del Roy 163.*

Vide 57. e.

Also a parson may have a *cessavit*, if his tenant who **C** holdeth of him cesselth, &c. or a writ of escheatry, if his tenant die without heir. And by the statute of *West. 2.* he may have *quod permittat* of common pasture.

Vide 50. H.

And if a parson with the assent of the patron and ordi- **D** nary leaseth his glebe lands for life, and the tenant alieneth in fee, or loseth by default; it seemeth the parson who leased the land shall have a *consimili casu* during the life of the tenant for life; and after the death of the tenant for life, a writ of *entry ad communem legem*.

And if an abbot or prior be parson imparsonnee of a **E** church, and alien the land of the rectory, his successor shall have a *juris utrum* to recover the land, and not other writ, because he shall have that as parson.

And if a man lease lands unto one for life, and after. **F** wards grant the reversion by licence unto a parson and his successors, and the tenant attorn, and after the tenant for life lose the land by default, or alien in fee; the parson shall have a writ *de consimili casu* during the life of the tenant for life, and after his death he shall have a writ of *entry ad communem legem*, &c.

And if a parson lose by action tried, or lose by default, **G** his successors shall have a writ of error or attain.

And if a reversion be granted unto a parson and his suc- **H** cessors by licence, he shall have a *quid juris clamat*; or if the services of a tenant be by licence granted unto a parson and his successors, he shall have a *per quæ servitia*: and so of a writ of *quem redditum reddit*, &c.

Cap. 11.
Par. 49.

And so if a parson be tenant in common of a wood, or **I** other land, in the right of his church with another, and the other tenant do waste in the wood, or land, &c. the parson shall have a prohibition; and if he do waste, he shall have a writ of partition, and the place wasted shall be assigned to the other party by the statute of *West. 2. cap. 22.* But if a parson be patron of a vicarage, and the vicarage void, and a stranger do present, the parson shall have a *quare impedit* or *darrein presentment*: but if the six months pass, he shall have a writ of right of advow- **K** son, because that that writ is given only for him who hath the intire fee and right in him, and the parson hath
not

not the same; for the right is in the patron and ordinary.

L Nor shall a parson have a writ of right *sur disclaimer*, nor a writ of customs and services, nor an *injūste vexes*, nor such writs as are grounded upon the mere right. But it seemeth he may have *contra formam collationis*, or *feoffamenti*, and a writ of *mesne*, and *ad terminum qui præterit*, &c. and such possessory writs which are grounded upon the mere right.

20 Ed. 3. *Juris utrum*, &c. Old N. 125. contra.

M And a parson or a vicar shall have a writ of *jurus utrum* against those who are several tenants; and then the form of the writ shall be such:

N (a) *The king to the sheriff of S. greeting: if L. bishop of London, parson of the church of E. shall make you secure, &c. then summon twelve free, &c. of the neighbourhood of E. that they be before our justices at Westminster such a day, ready by oath to recognize, whether twenty acres of land with the appurtenances in E. be frankalmoign belonging to the church of him the said L. or the lay fee of A. B. C. and D. and in the mean time let them view that land, and summon, &c. the aforesaid A. who holds two acres thereof, B. who holds eight acres thereof, C. who holds five acres and one rood thereof, and D. who holds four acres and three roods thereof, that they be then, &c.*

O And two prebendaries may be one parson in one church, and then they shall join in a *juris utrum*; and their writ shall be such:

If W. prebendary of the prebend of N. and R. prebendary of the prebend of I. in the church of the blessed Peter of York, parson of the church (a) of A. annexed to the prebends aforesaid, shall make you secure, &c. then summon twelve, &c. (as last above).

(a) This writ seems intended of an appropriation, and not of a commendam, and seems maintainable in, &c. 29 Ed. 3. 11.

And in this writ it is no plea for the tenant to say, that he is parson of the church of D. and that this is the free-

hold of his said church, (judgment *de Breve*) for the plaintiff (court) cannot take notice thereof, (or join issue thereupon.) 3 Ed. 2. Brief 785.

(a) See the like clause, Rot. 26 Ed. 1. M. 10. dorso, *ecclesia de Ayrmir spectan' ad prebendam de Grendale & Worsbill, diocesis. Exon.* See Co. Lit. 18. a.

M 4

And

And where a man is parson of the moiety of the church, and another clerk is parson of the other moiety of the same church, then one may have a *juris utrum*, and the writ shall be such:

If W. parson of the moiety of the church of N. shall make you secure, &c. then summon twelve, &c. by oath to recognize whether, &c. be frankalmoign belonging to the moiety of him the said W. of the church aforesaid, or frankalmoign belonging to the other moiety of R. parson of the other moiety of the church aforesaid, &c. And dean and chapter may have juris utrum in special case where they are wardens of a chantry, thus:

[50]

The king to the sheriffs of London, greeting: If the dean and chapter of the church of Saint Paul, London, guardians of the chantry at the altar of the blessed Mary in the church of Saint Paul, London, ordained for the soul of Richard D. shall make you secure, &c. then summon, &c. of the neighbourhood of the city of London, that they be before our justices at Westminster such a day, &c. whether twenty shillings rent, with the appurtenances in the suburbs of London, be frankalmoign belonging to the chantry of them the said guardians at the altar aforesaid, or the lay fee of, &c. and in the mean time let them view the tenements whereof the rent issueth, &c. Witnesses, &c.

Where a parson alieneth the right of his church with warranty, and afterwards the alienee is impleaded, and voucheth the parson, who entereth into the warranty, and loseth by action tried, his successors shall have a *juris utrum* of the seisin of his predecessor, which he had before the alienation. And a vicar shall have a *juris utrum* against the parson for the glebe of his vicarage, which is parcel of the same church. (b) If a parson receive rent or fealty of the tenant of the land, which is aliened by his predecessor, he shall not, during his life, have a *juris utrum*; but his successors shall have *juris utrum*.

40 Ed. 3. 27.
2 H. 4. 2.
Quære.
11 H. 4. 13.
11 Ed. 3. *Juris utrum* 19.
7 Eliz. Dyer
239, 240.
22 H. 8.
B. Accept. 14.
2 Ed. 6.
B. Accept. 20.

(b) See 8 H. 5. 10. 2 H. 4. 5. 32 for years. 11 H. 4. 25. See also 8 Ed. H. 8. Acceptance 14. Contra of a lessee 3. 29. ante 49. I.

D If a writ of right be brought against a parson, who joineth the mise without praying in aid of the patron and ordinary, and afterwards loseth by default, his successor shall have *juris utrum*. Otherwise it is if he lose the land by verdict, as it seemeth.

E If a parson have a chapel annexed to his parsonage, to which chapel glebe is appurtenant, the parson shall have *juris utrum* of the same.

F A recovery in a *cessavit* against a parson by default shall not bar his successor, but he must have a *juris utrum* against him who recovered.

G If a chaplain of a chantry lose the lands of his chantry by an assise of *novel disseisin*, yet he himself shall have a *juris utrum*, because that is a writ of right; and the writ is to enquire, *whether it be free alms of the chantry or lay fee, &c.* *H. 1 R. 2.*

H The parson or vicar shall have a *quod permittat* in the *debet* only, of his own seisin or of the seisin of his predecessor; and may have that *quod permittat* in the nature of an assise of *mortdauncester*, upon the dying seised of his predecessor.

1 Ed. 1. *Quod permittat* 9.
32 Ed. 1.
Comment. 24.

I In a *juris utrum* the plaintiff ought to be named parson or vicar, or such name in right of which name he bringeth his action: for if abbot or bishop, or a dean, bring a *juris utrum*, by reason of any land which is parcel of the rectory annexed to the bishoprick, or appropriated unto the abbey or deanry, they ought to be named parsons of the church in the writ.

K In a *juris utrum*, if the tenant at the first day do make default, resummons shall be awarded; and if he make (a) default again at the summons returned, then the jury

L shall be taken. (b) And the tenant shall plead in a *juris utrum*, as the tenant shall plead in assise of *novel disseisin*, *scil.* two or three dilatories to the writ; and if it be not

(a) And therefore he shall not be es-
soined at the resummons. 11 Ed. 3.
Essoin 4.

(b) See 11 E. 3. *Juris utrum* 2.
40 Ed. 3. 29.

found, then to pray the jury to inquire of the points of the writ (c).

And where the *juris utrum* is brought against several tenants by several summons in the writ, it may be taken against one only for that parcel, and afterwards against the others. But it is otherwise in an assise of *novel disseisin*, if it be not in special cases. M

Writ of Consultation.

See Prohibition.
See the stat.
De circumspecte
agatis,
13 Ed. 1.
Rastal, Prohi-
bition 3.
37 H. 6. 9.
Ashton.
Com. Dig. tit.
Prohibition
G. 2.

IF the bishop cite any of the parishioners of the church to be contributory unto the reparations of the parish church, (d) or of any chapel annexed thereunto, if the party who sueth the prohibition directed unto the bishop, suppose that he is impleaded of a lay fee in the spiritual court, the bishop shall have a consultation upon the matter shewed in the chancery, on the part of the bishop. N

And so if a man obtain any judgment or sentence in the spiritual court for a legacy of money, or other chattels, if the executors will sue a prohibition to delay the execution of the judgment, the party shall have a consultation. O

And if any chaplain of the king's free chapels keepeth any concubine, then the bishop may cite him before him to punish him: and if the chaplain purchase a prohibition, because the king's free chapels ought not to be visited by the bishop; yet upon the matter shewed the bishop shall have a consultation to proceed to correct him by pain corporal, and not pecuniary. P

If a prior and convent sue in the spiritual court, for tithes and mortuary, *J.* parson of the church of *C.* and an abbot come into the chancery, and surmise that *J.* holdeth the church of his patronage, and that the prior, &c. claimeth the third part of the church of his own advowson and patronage, and prayeth an *indicavit*, and the same be granted; Q

(c) See 17 Ed. 3. 48. accordant, *per Thirn.* But note there, in a *juris utrum* against *A.* and *B.* by several summons, nothing was done against *A.* but the jury was taken against *B.* only, and found for the demandant; but *Stone* would not give judgement.
(d) See the *Register* 44. accordant.

now the prior, &c. may shew this matter in the chancery, and have a consultation, because that in the statute of *articuli cleri* it is contained, that in dismes and mortuaries, when under these names they are proposed, there is no room for our prohibition.

See Articuli
Cleri, cap. 1.

R If a prior sue in the spiritual court for the moiety of the tithes of four plough-lands, which he claimeth as appertaining unto the church of *N.* whereof he is a parson imparsoned, which are not of the value of the fourth part of the church, if the other purchase an *indicavit*, surmising that they are of the value of the fourth part; he who is sued in the spiritual court shall have a consultation to proceed, so that nothing be done touching the advowson of any part of the church, the said prohibition notwithstanding.

S If a man promise unto another with his daughter in marriage ten pounds, by reason whereof the party marrieth his daughter, if he who promiseth the money will not pay the money, he shall be sued for the same in the spiritual court; and if he purchase a prohibition, the other shall have a consultation: and if he who promiseth the money die, yet the husband who married his daughter may sue the executors for that money, or the executor of his executors in the spiritual court.

V. ant. 44. A.
14 Ed. 4. 6.
17 Ed. 4. 6.
Com. 309.
20 Ed. 4. 3.
[51]

A And if any of the parishioners do disturb any parson or vicar to carry his tithes by the usual ways and passages, the parson may sue in the spiritual court for this disturbance; and if the other sue a prohibition, upon the matter shewed he shall have a consultation.

B If a parson or vicar have a pension out of another church, and the pension be kept from them, and another parson take and claim the same; the parson or vicar who ought to have the pension may sue for the same in the spiritual court. And so if a parson or vicar, or master of an hospital, sue for a pension in the spiritual court, which they and their predecessors have had time out of mind, &c. if the other party purchase a prohibition, upon the matter shewed he shall have a consultation: and yet it seemeth, that upon the prescription he may maintain a writ of annuity

Pension.
See the stat.
34 H. 8. c. 19.

nuity at the common law, but the same is in his election (a). But if he once sue a writ of annuity at the common law for the same, and declare there upon the prescription, then he shall not afterwards sue in the spiritual court for that annuity in the name of a pension; and if he do, it seemeth the party may have a prohibition against him.

38 H. 6. 19.

Vide 36. A.

38 H. 6. 19.
For where the title of the patronage is in question, there is no spoliation.

And a parson may sue in the spiritual court a spoliation **C** against another for taking his tithes, or for taking any pension which doth appertain to his church, although they claim by several patrons, and of their several presentments; but this is intended only where the tithes and profits taken and spoiled do not amount unto the fourth part of the value of the church; for if they claim by several patrons, and the tithes, profits or pensions amount unto the fourth part of the church, then the party grieved shall have an *indicavit*, because the title of the patronage doth come in debate, &c.

But if they claim by one and the same patron, and of his presentment, then one parson shall have a spoliation in the spiritual court against the other, although the profits do amount unto a fourth part, or a third part, or the moiety of the church, because the title of the patronage comes not in debate; and if a prohibition be sued thereupon, the party shall have consultation.

If a man have his sheep lying and feeding for one year in a parish, the parson of the parish may sue in the spiritual court for tithe of wool of those sheep; and if the party sue a prohibition, he shall have a consultation. **D**

And note, that consultation shall be granted and directed **E** to the party himself who sued in the spiritual court, that he do proceed in his suit there; and also he may have a consultation directed unto the judge, commanding him to proceed there notwithstanding the prohibition aforesaid.

(a) See 2 *Inst.* 491. That it is only suable at common law, yet in *Siderfin's Reports* 146. it is said by the court, that the plaintiff hath his election, but there *Twijden and Windham J.* cited a case, in the time of *Jac. 1.* in *B. R.* where

Coke held the law to be contrary, and *Fitz.* opinion denied. See 1 *Mod.* 218. 1 *Ventr.* 3. 120. 265. 2 *Keb.* 489. 802. 2 *Lev.* 128. *Lord Raym.* 323. 579. 2 *Salk.* 550. 2 *Str.* 879. *Gro. Ja.* 666. *Infra.* 52. *L.* 53. *H.*

- F** And the parson may sue the executors of his predecessor in the spiritual court for the dilapidations, and for that sum of money which is found by the inquest charged by the bishop or ordinary, that the dilapidations do amount unto, to pay the same; and if the executors sue a prohibition, the party who sued in the spiritual court shall have a consultation directed to the same, &c. to proceed; and another consultation directed to him to sue as before.
- G** And if a man detain his tithes for his sheep, which are in the parish, and there feeding for half a year, if he die, the parson may sue his executors for these tithes in the spiritual court, and shall have a consultation, if the executors sue a prohibition. And the parson by prescription may claim Prescription. the tithe of calves and kine, and milk of cattle feeding in the parish from the feast of the Holy Trinity unto the feast of Saint Peter, which is said *ad vincula*; and the tithes of wool forth-coming of the sheep of his parishioners, killed and dying from the feast of Saint Michael to the feast of the Passover, every year; and the tithes of honey and wax forth-coming of the bees and bee-hives within the limits of his parish; and may sue for them in the spiritual court, and shall have a consultation, if he be disturbed by prohibition.
- H** And a man may sue in the spiritual court for a legacy: Infra 54. A. where a man deviseth *fabricæ ecclesiæ* twenty shillings, &c. the parson may sue the executors for the same in the spiritual court, &c. and may sue the executors in the spiritual court for the tithes of mills due by the testator in his lifetime. And so a vicar may sue in the spiritual court for the tithes of beans and oats, arising within certain limits within his parish. And so he may sue for tithes of pannage forth coming of his wood, and for foals forth-coming of his stud or breed of horses, and for butter, cheese, and meats made of milk in winter-time. But it seemeth the same ought to be by prescription. And it was agreed before the king's council in the parliament holden at Salisbury, That consultations ought to be for tithes of wood used to be cut, notwithstanding Infra 54. B. such tithes are not yearly renewed.
- I** (a) A man may sue in the spiritual court, where ano- 27 H. 8 13.

(a) Note; The offence in this case 4. 10. 2 Ed. 4. 10. ought to be merely spiritual. 22 Ed.

ther man doth defame him as a falsifier, an adulterer, or an usurer, &c. See *post*. 53. F.

12 H. 7. 23.
per Constable.
11 H. 4. 88.
7 H. 4. 1.
Infra 52. F.
Salk. 548.

And a parson or other priest, may sue in the spiritual court for laying violent hands upon him, &c. to have him (b) excommunge, or to have corporal punishment, but not to have damages there.

[52]

Where a prior sueth a parson in the spiritual court for two portions of tithes forth-coming of the demesnes of F. whereof the parson hath spoiled the said prior, for which the parson purchaseth an *indicavit* in the chancery, surmising that the tithes do amount unto the fourth part of the value of his church, and that the king is patron thereof, by reason of the wardship of an infant in the king's hands, by reason whereof the prior cometh into the chancery, and sheweth there that the tithes do not amount unto the fourth part of the value of the church, and hath a writ directed unto the bishop to certify the king into the chancery the value of the church which the parson holdeth, and the value of the tithes demanded by the prior: if the bishop by his letters certify for the prior, then the prior shall have a consultation. And so it seemeth by this writ, that where an *indicavit* is sued, &c. the king shall be certified by the bishop's letters upon a writ directed to the bishop what is the value of the church, and also what is the value of the tithes demanded in the spiritual court, before a consultation shall be granted: and it seems to be a good rule, and a good order, so as no party shall be deceived: and this certificate of the bishop shall bind the party to say or aver any thing against it. But a consultation shall be granted upon the certificate returned, &c. but notwithstanding that, if it be unto the fourth part of

11 H. 4. 48.
So if the bishop
certify that J. S.
is utlage, or in
prison at the
time of the ut-
lagary, 15 Ed. 3. Utlagary. 2. Brev. Estoppel. 211.

(b) See accordant 7 H. 4. 1. *Si non de violata pace nostra, sed de excommunicatione nostra ad correctionem animæ tantummodo agatur. Register 49. b.* See 11 H. 4. 88. a. per Thirning. Where the defendant in attachment on a prohibition pleads that he was a

clerk, and had tonsure, and that the plaintiff beat him, and that he the defendant sued in court christian, only to inform the court, that the plaintiff had offended against holy church, without suing in any other manner.

the

the value of the church, the party may sue a writ of right of tithes, &c.

A If a bishop make an order, that the parson of such a church shall yearly pay unto the abbot of *B.* and his successors two parts of the profits of the church in the name of a yearly pension, and that the parson, before he have possession of the church, take an oath so to do, for which the parson sueth in the court of *Rome*, and obtaineth a delegacy directed unto the bishop and his officers, to repeal the order, &c. Now if the abbot sueth a prohibition upon this matter, the parson shall have a consultation.

B If a lay-man will not make his offerings at days limited to the parishioners to offer, or will not confess himself unto his curate, or receive the sacrament of our Lord Jesus Christ of his curate, by reason whereof the curate citeth and sueth him in the spiritual court for the same: if he purchase a prohibition, &c. upon shewing the matter a consultation shall be granted.

Hardr. 406.
Skin. 101.
Salk. 166.

C If the churchwardens of any church have used time out of mind to receive yearly of one of the tenements of the parish a pound of wax to maintain the taper before the crucifix in the church, and he who is now tenant of the tenement refuseth to pay this wax, &c. there the churchwardens may sue in the spiritual court for the same: and if he obtain a prohibition, consultation shall be granted.

See for their capacity at the common law.
11 H. 4. 12.
7 H. 6. 30.
12 H. 27.
8 Ed. 4. 6.
12 H. 7. 21.

D If a man be condemned in the spiritual court in a cause of defamation, for which he appealeth unto the court of *Canterbury*, &c. and there the sentence is confirmed, and the party condemned in twenty shillings for costs, and the cause remitted unto the judges before whom it was first commenced, by reason whereof he who is condemned sueth a prohibition; the other party shall have a consultation.

E If a parson detain from the parishioners the goods of the church, and in his will enjoin his executors to deliver them unto the parishioners; the parishioners may sue the executors in the spiritual court for them; and if they sue a prohibition, the parishioners shall have a consultation; and this consultation may be sued by any of the parishioners who will sue in the spiritual court. If the bishop or his official cite any man for laying violent hands

See 51. K.

hands upon any clerk, &c. if he sue a prohibition, the other may have a consultation; *provided the spiritual court act only touching corporal and not pecuniary punishment, &c.*

If a man in time of the vacancy of a parsonage or vicarage will not pay his tithes, and the ordinary *ex officio* cite him to pay them, &c. if he purchase a prohibition, the other shall have a consultation granted unto him. G

If an abbot and convent are bounden, by reason of any ordinance lawfully made, to find four chaplains to sing in such a church or chapel for the souls of such or such, and if they fail to find them, they bind themselves in divers pains and censures; and if they fail in all or in part to find these chaplains, they have granted that the dean of *Salisbury* or his official, shall interdict their church, and so hold it until they have satisfied, &c. for which the dean or his official, *ex officio*, cite the abbot and convent to find the said chaplains, &c. if they sue a prohibition, the dean or official shall have a consultation in that case. H

If the ordinaries do forbid the friars, that they shall not hear confessions, nor they shall not admit any one to be buried in their church, and sue them in the spiritual court for that cause; if the friars purchase a prohibition, the ordinaries shall have a consultation. I

See 51. I.
No proceeding in the spiritual court for solicitation of a wife's chastity, after conviction and judgment on an indictment for an assault on her, with intent to ravish. Salk. 552. 7 Mod. 79. Supra 51. B.

If a man sue in the spiritual court for taking and detaining from him his wife lawfully married unto him, if the other sue a prohibition for the same, he shall have a consultation, forasmuch as for restitution of his wife only he sued, &c. And yet he may have an action at the common law, *de uxore abducta cum bonis viri*, or an action of trespass for taking the wife, as it seemeth. K

And a parson shall sue for a pension of forty shillings in the spiritual court, whereof the house hath been seised time out of mind, and shall have a consultation thereupon, if a prohibition be sued, &c. L

If a man recover in the spiritual court in a cause of defamation, costs, he shall sue there for the costs; and if the other sue a prohibition, he shall have a consultation. M

And if a man have corporal punishment in the spiritual court for a cause of defamation, or for laying violent hands upon a clerk, &c. if the party will redeem his penance, A

[53]
32 H. 7. 22.

nance, and promise to pay unto the party a certain sum for his damages, &c. if after he will not pay the money unto the party, the party damnified may sue for the same in the spiritual court; and if the other party purchase a prohibition, he shall have a consultation.

B If a parson for an offence have judgment to be deprived in the spiritual court, and the patron do present another parson unto the ordinary, who sueth the first parson in the spiritual court, because he will not void the church, but defend himself by appeals, or other matters, &c. now if the first parson purchase a prohibition, the other may sue a consultation; or without any prohibition sued by the first parson, the parson may sue a writ in the chancery unto the spiritual judge, to proceed in the spiritual court upon the cause of deprivation and disability.

C Upon a legacy given to any order of friars, they may sue the executors in the spiritual court for the same. And if the executors purchase a prohibition, they may have a consultation upon the matter shewed, &c.

D If friars, or other persons whosoever, sue in the spiritual court for a legacy, and have process against others as witnesses in that cause; if the witnesses will sue a prohibition, surmising that they are sued against their wills *ex officio judicis*, in the spiritual court, &c. yet he or they to whom the devise is made shall have, upon the matter shewed, a consultation.

And note, That the justices of the king's bench may grant a consultation of tithes as well as the chancellor.

And when the justices grant a consultation of tithes of spoliation, they make the libel indorsed in such manner:

The lord the king doth not prohibit (a) cognizance touching spoliation of tithes, in the ecclesiastical court, so as it be not litigated there touching the right of patronage or the advowson of tithes. And so they give no power by the indorsement; and the rule in the register is by those words.

(a) Most of the old editions have "habet" instead of "*prohibet*" in this place, and Serjeant *Wilson* has translated it "hath not cognizance." But

the sense evidently requires *prohibet*, and so is the *Register* 54. B. whence the passage is taken.

To this rule
there are several
exceptions.

See 51. I.

52. M.

27 H. 8. 13.

ac. Br. Consul-
tation 7.

See 1 Cro. 446.

Register 55.

Br. Dismes 18.

* Of coals, &c
by custom tithe
may be due.

2 Inst. 651.

2 Vern. 46.

† Agistment;
this must mean
of profitable
cattle. Sir Si-
mon Degg 247.

Nota, That the justices said, that tithes shall not be but **E**
of such things as increase from year to year, and that by
the manure of man: but that is against the decretals.

And all the justices are against a consultation in a cause **F**
of defamation, because, it seems, he may have his action
at common law for the same defamation.

Also of coals, or of quarries, of coals,* &c. or the like, **G**
a man shall not pay tithes, nor of † agistment, because
that he payeth tithes for the cattle which feed in the
pastures.

And also they say, that properly a consultation ought **H**
ought not to be granted, but in case where a man cannot
recover at the common law in the king's courts. *Supra*
51. B.

And if the bishop cite a man *ex officio* to appear before **I**
his officers for fornication, &c. or such like offences, and
the party defend himself by appeals, or such other delays,
and by suing a prohibition unto the spiritual court, and
afterwards he wave the delays, and submit himself to the
judgment of the spiritual court, and they delay to proceed
in these causes for the vexation and delays, and the suing
of the prohibition which the party had before; then the
party shall have a writ directed unto the spiritual judges,
that they do proceed *in case of defamation to impose canonical*
punishment, and in case of submission, &c. Provided that
whatever may any way tend to the derogation of our royal right,
be in no wise attempted by you.

If the very patron present an able person to the ordinary, **K**
and the ordinary refuse him, and afterwards a disturber
present unto the ordinary another person unto the same
church, and the ordinary admit, institute and induct him,
and afterwards the very patron recover his presentment
against the disturber; for which cause the presentee of the
very patron sueth the presentee of the disturber in the
spiritual court, to avoid and remove him; for which cause
he sueth a prohibition, &c. now the presentee of the very
patron shall have a consultation unto the spiritual court
to proceed in that case, &c. But first the record in the
common pleas ought to be certified into the chancery of
the

the recovery, or of the composition there made of the title of the presentment, before the consultation shall be granted.

- L If the tenants or possessors of any lands or tenements within any parish have used to find a chaplain to say divine service in the parish church, &c. time out of mind, &c. and afterwards they withdraw, and will not find such chaplain, &c. then the parson and parishioners shall sue against them in the spiritual court, for to find such chaplain in the church: and if the tenants or possessors of the land sue a prohibition, upon the matter shewed in chancery, the parson and parishioners shall have a consultation to proceed, and by such words; *we signify to you, that you may lawfully proceed in that cause as to the reducing the chantry aforesaid to its original state, &c. and that you may act as to the imposing a due punishment, by reason of such subtraction from the said chaplain thereof, and may further do that which you shall know to belong to ecclesiastical jurisdiction; our said prohibition, or any other to be directed to you hereafter in the cause aforesaid, notwithstanding, &c.*

And if it be after time of memory, viz. in the time of R. 1. and before the statute of *Mortmain*, the parson and parishioners shall have such suit for a chantry, &c. And if a parson and parishioners sue one such tenant and possessor of the lands to find such chaplain, &c. and he sue an inhibition from the court of *Canterbury*, or appeal unto the court of *Canterbury*, or make such subtle delays in the court of *Canterbury*; then the parson and parishioners shall have a special writ unto the archbishop and his officers: *that you may proceed and act in the cause and process devolved before you in the court of Canterbury, by virtue of the appeal aforesaid, so far as relates to the reducing the chantry to its due state, the imposing and causing to be imposed due punishment, by occasion of such subtraction from the same, and may cause the said sentence pronounced against him, if rightly deduced, to remain in its full strength, and further do, &c. our said prohibition notwithstanding.*

- A If a man devise an ox or a cow unto the church for reparation thereof, or for the churchyard, and he who

hath the cow or the ox will not deliver the same unto the churchwardens; then the ordinary *ex officio*, or the churchwards may cite him, and sue him for the detaining of the cow or ox: and if the other party sue a prohibition, the churchwardens shall have a special consultation: *We signify to you, that in the cause aforesaid as to the restitution of the legacy aforesaid to the said churchwardens in form aforesaid, and as to imposing on him canonical punishment for detaining thereof, it may be litigated before you, and you may lawfully proceed and further do that which to the ecclesiastical court, &c. our prohibition notwithstanding.* And if he will not proceed upon that, they may sue an attachment, &c.

And in many cases a man shall have a special consultation. As, if a parson sue in the spiritual court for tithes of great trees which pass the age of twenty years, and make his libel by the name of *silva cædua*; now the party may shew in the king's bench or in the chancery that the trees were great trees above the age of twenty years; and upon this surmise he shall have a special consultation to proceed, *so that it be touching silva cædua, and not of other trees which are past twenty years growth, or the age of twenty years.* And see the statute for the same, *Anno 45 Ed. 3. cap. 31. (a)*

Supra 51. H.

If a man have a chapel within his manor which is a denotive chantry, or presentable, and the chaplain hath used to have the tithes arising of the demesnes of the manor time out of mind, &c. Now if a parson (in whose parish this chapel is) sue the lord of the manor, and also the chaplain in the spiritual court, for the tithes of the same manor, they shall have a prohibition, &c. because the advowson of this chapel may come unto the king by wardship or escheat, &c. And then the parson within whose parish this manor and chapel is, shall have a special writ of *scire facias* against the lord of the said manor, and also against the chaplain, returnable in the chancery at

(a) This statute is merely declaratory of the common law. 3. *Burn's E.* L. 456. per Lord *Hardwicke*.

a certain day, if they can say any thing wherefore a consultation shall not be granted, and the writ of prohibition revoked and repealed; and further to do as the court shall award in that case. And in the end of the writ shall be, *And have you there the names of those by whom you shall give him notice, &c. and this writ, &c.* Which writ appeareth in the register in the end of the writs of *significavit*.

See Plow. 472.
In Molin's case.
Plow. commends
this form of
scire facias; but
there is another
form used at this
day.

Breve de Vi Laica removenda (1).

D THIS writ *de vi laica removenda* lieth as well upon a surmise made by the incumbent, or by him that is (a) grieved, &c. without any certificate thereof made in the chancery by the bishop, as upon a certificate thereof made in the chancery by the bishop.

Old Na. Br. 33.
cont. and Mar-
row in his read-
ing.

E And when the bishop makes certificate into the chancery of the force, then the form of the writ is such:

The king to the sheriff of Lincolnshire, greeting: At the request of the worshipful father the bishop of Lincoln we command you, that all lay force which holds itself in the church of L. of his diocese, to the disturbing of the said bishop, whereby he is less able to exercise his spiritual office in that church, you without delay do remove from the same, &c. And he shall have an alias and a pluries, and an attachment against the sheriff, directed unto the coroners if he do not serve or return the writs.

F And if the king do collate unto any prebend of any bishop come to him by title, and the bishop make resistance, that the king's presentee cannot have the cor-

(1) In 2 Inst. 54. this writ is said to be *lex terræ*, by process of law, *pro pace ecclesiæ*.

(a) If one has a writ to the bishop, and a disturbance of its execution is made by the incumbent, or any other, the justices of C. B. may grant reme-

dy. But not if the disturbance be after the execution of the judgment. 12 H. 4. 26. Not upon a suggestion. But upon a suggestion of the party grieved in the chancery, he shall have this writ.

poral possession thereof; then the writ shall be directed unto the sheriff, and shall be such:

We command you, that all lay or armed force which holds itself in the said church, or in the houses thereto adjoining, to the disturbing of our peace in your county, you do without delay remove from the same, and if you shall find any persons resisting in this matter, that you attach them by their bodies, and keep them in safe custody in our prison, so that you may have them before us on the octave of St. Hilary, &c. wheresoever, &c. to answer us touching the contempt and resistance above-mentioned: and have there the names of those whom you shall have attached, and this writ. And this writ *de vi laica removenda* may be made returnable, or not returnable, at his pleasure who will sue the writ; and it may be returned into the common pleas as well as into the king's bench. G

[55]

And note, that by this writ the sheriff ought not to H remove the (a) incumbent who is in possession of the church, whether the possession be of right or wrong, but only to remove the force, and to suffer the incumbent to enjoy the possession: and if the sheriff do amove, or would put out the incumbent who is in possession, the incumbent shall have a writ directed unto the sheriff, commanding him that he do not put him out; and if he have put him out, that without delay he make him amends: and if he do not so do, the party may have an *alias* and *pluries*, and attachment against the sheriff. And the form of the writ *de vi laica removenda*, without the certificate, is such:

The king to the sheriff, greeting: We command you that all A lay force, as also armed power, which holds itself in the prebend of E. in the church of C. to the disturbing of our peace, you do without delay remove from the same: and if you shall find any persons resisting you in this matter, then having taken with you a sufficient power of your county, if it shall be necessary, attach them by their bodies, &c. (as above).

(a) And if he remove him, the court of king's bench shall award his restitution, altho' it appears the in-

cumbent had no title. *M. 43 & 44 Eliz Ascot ver. Batchellor.*

B And the form of the certificate of the bishop is such :

To the most excellent prince and his lord, the lord Henry by the grace of God, &c. W. by divine permission archbishop of York, primate of England, sendeth greeting in him by whom kings do reign and all things subsist : we make known to your royal highness by these presents, that certain persons unmindful of their safety do hinder and disturb the possession of master I. in the church of C. of our diocese, canonically conferred upon him, which A. some time kept occupied to the prejudice of our office and of ecclesiastical liberty, and of the right of the aforesaid I. Therefore we humbly beseech your excellency with your wonted grace to stretch forth the arm of your royal authority, to the end that this force and power may be absolutely removed, that the rebellion of the enemies of Christ being thus suppressed by your aid, ecclesiastical liberty may remain safe and unhurt under the shield of your defence, and you may therefore obtain from God a worthy recompence, who, may he long preserve you to his church and people ! Dated at B. the fourth of the calends, &c.

Writ of Waste.

C **T**HE form of the writ of waste against tenant in dower doth vary from the form against other tenants ; for the writ of waste against tenant in dower is such :

The king to the sheriff, &c. If A. shall make you secure, &c. then summon by good summoners B. (b) who was the wife of C. that she be before our justices at Westminster in fifteen days of the Holy Trinity, to shew wherefore she hath committed waste, sale, destruction (c) and banishment of the lands, houses, woods, gardens, and men, which she holds in dower of the inheritance of the aforesaid A. in N. to the disherison, &c. And in that writ he doth not rehearse the

(b) Where the writ shall be against her by her proper name, see 32 Ed. 3. Brief 265. 31 Ed. 3. Brief 326. *nem in terris & hominibus*, adjudged good, without saying *exilium*. 2 H. 6. 11.

(c) *Quare fecit vastum & destructio-*

statute which gave the writ of waste, (a) nor the writ of waste against the guardian, because they were punishable at the common law, before the statute, by prohibition and attachment thereupon, if they did waste. And *exilium in hominibus* shall not be put in the writ of waste, if the tenant in dower, or other tenant, do not misuse the villains of the manor, by reason whereof they depart from the manor, or from their tenures; and if they do, then it is waste. And in a writ of waste against tenant for life or years, he shall recite the statute in such form:

The king to the sheriff, &c. If A. shall make you secure, &c. then summon, &c. B. &c. wherefore, seeing that it is provided by the common council of our realm of England,

(a) *Of pleadings and process in waste.*] The defendant pleads a plea in bar, which does not acknowledge the waste as a grant to hold without impeachment of waste, &c. if there be a demurrer thereto, and it is ruled against him, yet the sheriff ought to enquire of the waste and damages; *per Thorpe*: And therefore he may after the demurrer traverse the point of the writ, and plead no waste done. 38 Ed. 3. 24. a. b. The plaintiff in maintenance of his writ, tenders an averment, that the tenant refuses, this is peremptory against the tenant. 6 H. 4. 5. a. b. In waste against two, one makes default, and the other appears, who thereupon is put to answer. 4 Ed. 3. 33. 39 Ed. 3. 19. 12 H. 4. 5. b. *Quære*, If a writ of enquiry shall be awarded? If *nihil* be returned on the summons, attachment and distress, and the tenant makes default, the waste shall be inquired. 12 H. 4. 4. 21 H. 6. 56. Where the writ of enquiry is of a waste in two villis, the jurors ought to view both the one and the other; but it is sufficient, though the inquiry be taken at any other place. 12 H. 4. 9. b. In waste against two, one makes default at the grand distress, the other appears; a writ of enquiry shall not be granted, for one cannot answer

without the other. 14 H. 4. 37. See the contrary to this, *supra*.

Note; In waste in the *tenet*, the summons shall be *in terra petita*, although in truth another person is tenant; as if one does waste, and afterwards grants over his estate, and upon the distress issues shall be returned on this writ. But if it be in the *tenuit*, although the sheriff on every writ returns *nihil*, yet a writ to enquire of the waste shall issue. 11 H. 6. 4. a. 12 H. 4. 4. a. and 21 H. 6. 56.

In waste by *Darrel* against *Leyburn*, judgment was on a *nihil dicit*. Now if the plaintiff will release the damages, he shall have judgment for the place wasted. *Quære*; For a writ shall issue to enquire of the damages, but not of the waste, for that is acknowledged. And by the same case, the sheriff need not find deer on the on the place wasted. *Dyer* 204.

Note; In waste in *domibus*, *boycis*, &c. the plaintiff may abridge the waste assigned, so that he do not falsify his writ; and therefore he cannot abridge the whole waste supposed in *domibus*. *Dyer* 272. b.

On a writ of enquiry of waste on judgment by default, the jury may find no waste done. 19 Ed. 3. *Waste* 30. 3 H. 6. 296. *per Martyn*.

that

that it shall not be lawful for any person to commit waste, sale or destruction of lands, houses, woods or gardens; the same B. hath committed waste, &c. of the lands, houses and gardens in L. which (b) the aforesaid A. demised to him, &c.

D And if an abbot bring a writ of waste against tenant in dower, the writ shall be, *To shew wherefore she hath committed waste of the lands, &c. which she holds in dower of the right of his church, to the disherison of his (c) church, &c. and shall not say, Of the inheritance of him the abbot, nor to the disherison of him the abbot, &c.* But if the heir bring a writ of waste against the tenant for life of his ancestors, then the writ shall suppose that the tenant holdeth of the inheritance, &c. and that the waste is done to his disherison, &c. and that they have made waste of lands they hold in dower of the wife, yet the husband doth not hold in dower.

29 Ed. 3. 15.
Et. 3 Ma.
Dyer 129.

E (a) And the writ of waste shall be always brought against the tenant in dower or tenant by the curtesy, although they have granted over their estates unto others.

F If the husband make a feoffment of his land, or a stranger abate after the death of the husband, or disseise the husband in his life-time, and afterwards the wife recover

(b) Note; If A. and B. jointenants, or parceners, make a lease for life or years, and A. dies without issue, B. may have waste against the lessee, supposing that he himself had leased the estate. 46 Ed. 3. 17. 4. 35 H. 6. 39. a. per Prisot. But if waste be brought, supposing that A. and B. leased to the defendant for life, remainder to the plaintiff: It seems a good plea, that A. leased it sole, *absque hoc*, that A. and B. leased it. 6 H. 4. 5.

(c) *Ad exheredationem episcopi vel ecclesie.* 2 Mar. Dyer 129.

(a) Note 30 Ed. 1. 16. Tenant in dower grants her estate to the heir under age, and a stranger, rendring rent on condition of re-entry for non-payment. Waste is made, the heir disagrees, the tenant in dower re-enters for non-payment, the heir brings waste. If the heir at the time of, or

during the waste done, took any of the profits, &c. the waste is not punishable. But if the heir never took any of the profits, waste lies against the tenant in dower after the disagreement. See 38 Ed. 3. 25, 29.

The husband levies a fine, and takes back an estate for life, remainder to his son in tail, and dies; the son endows his mother, who assigns over her estate; the son brings waste against her, as tenant in dower; and adjudged that it lies; but it seems also, that he shall have a general writ, supposing that she held in dower of his heritage, 26 Ed. 3. 76. and yet he may have a writ making mention of the recovery; but such writ shall suppose that she held of his heritage; and it seems good, as well as in case of a feoffee, or where the disseisor of the husband assigns dower. 38 Ed. 3. 23. 14 Ed. 3. Brief 273, 282. *vide infra* G.

her

her dower against the stranger, &c. if he bring a writ of waste against the wife, the writ shall make mention of the recovery, &c. how she recovered the land against him.

20 H. 6. 28.

If a feme hold in dower of the king who hath the reversion, and the king grant the reversion in fee unto a stranger, and afterwards the feme commit waste; now the grantee shall have a writ of waste, and the writ shall make mention how she holdeth of the king, and how he hath granted the reversion unto a stranger, &c. and that she who held in dower of the stranger of the king's grant hath committed waste, &c. so if the husband die, and the heir make a feoffment unto a stranger in fee, who assigneth dower unto the wife, and she commit waste; the writ shall make mention that she held in dower of the gift of her husband by the (b) assignment of a stranger, of whom the aforesaid feme held in dower of the assignment which the heir of the husband hath made to the said stranger, to the disherison of him who bringeth the writ. The form of the writ of waste, where the wife is endowed *ex assensu patris*, is such :

3 & 4 Eliz.
Dyer 206. 208.

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The king, &c. If S. &c. then summon, &c. who was the wife of R. that she be, &c. to shew why she hath committed waste, &c. which she holds in dower of the gift of the aforesaid R. some time her husband, with the assent of A. of B. father of the aforesaid R. of the assignment of the same A. to the disherison of the said S. &c. And if the wife do recover her dower against the father, then the writ of waste shall make mention of the recovery thus: And which the same Isabel, in our court before our justices of the bench, by consideration of the same court hath recovered as her dower against the aforesaid A. to the disherison of him the said S. &c. And the writ may be of mills and vivaries; and then the writ shall be, To shew

(b) If A. makes a lease to B. to commence at a day to come, and then A. enfeoffs C. and C. enfeoffs D. before the said day; and afterwards B. enters and does waste, the writ shall be *in terris quas tenet ad terminum annorum de præfat' D. ex assignatione C. de quo*

idem B. tenuit ad eundem terminum ex assignatione A. &c. although there was no tenure before the term commenced. Dyer 206. Darrel ver. Leybourn. And so it is if the lessor enters on the lessee and makes livery, &c. 5 H. 5. 12.

where-

wherefore she hath committed waste in the lands, houses, mills, woods, vivaries and gardens.

A And if a guardian in chivalry grant over his estate, who maketh waste, the writ of waste shall be brought against the grantee, and not against the guardian; and it is not like tenant in dower or by the curtesy (a): but if the guardian do commit waste, and afterwards grant over his estate, then the heir shall have an action of waste against the guardian, and not against the grantee. And so if tenant for life or years commit waste, and grant over his estate, the writ lieth against him who doth the waste, and not against his grantee. And the form of the writ against the guardian is such: *The king, &c. If A. shall make, &c. then summon, &c. wherefore he hath committed, &c. which he hath or had in his wardship, of the inheritance, &c. to the disherison, &c.*

40 Ed. 3. 33.
Finchden.
41 Ed. 3. 23.
Candish.
42 Ed. 3. 19.
per curiam.
24 H. 8. 14.
20. ac.

B And against the executors of the guardian the writ is, *Summon, &c. B. and C. (b) executors of the will of, &c. wherefore they have committed waste, &c. which they have in wardship after the death of the aforesaid B. of the inheritance, &c. to the disherison, &c.*

C In a writ of waste against tenant by the curtesy, the form of the writ by the register is to recite the statute; and yet it seemeth the writ is good, although that he do not recite the statute; and the form of the writ is such:

20 H. 6. 1. ac.
See Co. Lit.
53. b.
2 Inst. 299. 301.

The king, &c. If A. shall make, &c. then summon, &c. wherefore, seeing it is provided by the common council of our realm of England, that it shall not be lawful for any persons to commit waste, sale or destruction of the lands, houses, woods or gardens demised to them for term of life or of years, or of those which they hold by the curtesy of England, the same B. hath committed waste of the houses which he holds by the curtesy of England of the inheritance of the aforesaid A. in N. to the disherison of

(a) See accordant 17 Ed. 3. 13. 43 Ed. 3. 15. 43 Ed. 3. 8. 30. 7 Ed. 3. 13. sed contra 26 Ed. 3. Waste 10. 27 H. 6. 7. 81.

See the statute 11 H. 6. Waste 9. post. 80. C. 40 Ed. 3. 33. 42 Ed. 3. 23. 44 Ed. 3. 21. 48 Ed. 3. 19.

12 H. 4. 4.

(b) Note 38 Ed. 3. 17. Waste against the executors of A. where in truth the defendants were executors of B. who was the executor of A. and the defendants never administered in the life of B. the writ shall abate.

him the said A. and contrary to the form of the provision aforesaid, as it is said: And have, &c.

And if the heir grant the reversion of tenant by the curtesy unto another in fee, and the tenant attorn, &c. then the form of the writ is such:

(c) *The king, &c. If the abbot of B. &c. shall make, &c. then summon B. &c. wherefore, seeing that (as above) the same B. hath committed waste, &c. of the houses in N. which he holds for his life of the aforesaid abbot, which A. of whom the said B. held them by the curtesy of England, of the inheritance of him the said A. assigned to the aforesaid abbot, &c.*

(a) And if the heir grant the reversion unto another stranger in fee, and the tenant by the curtesy attorn, and afterwards grant over his estate by the curtesy to another stranger, and afterwards that stranger commit waste; now the grantee of the reversion shall have his action of waste against the grantee of the tenant by the curtesy, for he cannot be tenant by the curtesy, if not of the heir, &c.

But if the tenant by the curtesy grant over his estate unto a stranger, and the grantee commit waste, the heir shall have the action against the tenant by the curtesy, and not against the grantee who committeth the waste. But if the heir have obtained or granted the reversion in fee, &c. and after the tenant by the curtesy attorn, and after grant over his estate unto a stranger who committeth waste; now the grantee of the reversion shall not have an action of waste against the tenant by the curtesy, (b) but against the grantee of the tenant by the curtesy. And if a feme be tenant in dower, and she grant her estate unto a stranger, and after the heir grant the reversion in fee unto another, and the tenant attorn and after the tenant for term of life commit waste; it seemeth that the grantee in reversion shall have an action of waste against the grantee of the

11 H. 4. 18.
10 H. 4. Attornment 16.
The attornment of tenant in dower is good.

(c) See the writ adjudged good, 32 Ed. 3. Brief 348.

(a) And the distress shall be in the land leased. 12 H. 4. 4. 21 H. 6. 56. b. ult.

(b) But if the husband's feoffee endow the wife, and she assign over her

estate, waste lies for him against the wife: For the plaintiff shall not suppose in his writ, that she held in dower of him *ex assignatione*, but only that she held in dower of his heritage. 38 Ed. 3. 23. adjudged.

tenant

tenant in dower, as he shall have against the grantee of the tenant by the curtesy. The form of the writ of waste against the tenant for life or years is such :

G *The king, &c. If A. shall make, &c. then summon B. &c. seeing it is provided by the common council, &c. in lands, &c. demised to them for term of life or of years; the same B. hath committed waste of the lands, houses, woods and gardens in L. which the aforesaid A. demised to B. for the life of him the said B. Or thus; which F. the father or mother, or any other ancestor of the aforesaid A. whose heir he is, demised to the aforesaid B. for a term of years, &c. to the disherison, &c. and contrary to the form of the provision aforesaid, as it is said: And have, &c.*

H And by the statute of *Marlebridge, cap. 23.* it is ordered, *That farmers, &c. shall not commit waste in houses, &c. or banishment of the men.* By which statute the writ of waste *de exilio hominum* is warranted, &c. 11 Ed. 3.
West. 113.

I In a writ of waste, if the premisses of the writ recite, *That it shall not be lawful for any person to commit waste in houses, woods and gardens;* in the end of the writ it is said, that the defendant hath done waste in lands, houses, woods, gardens, and exile of men; so as there is more in the end of the writ than is in the premisses, yet the writ is good: And so if less be in the end of the writ than is recited in the premisses, yet the writ is good. As if it be recited, *That whereas it is provided, that it shall not be lawful for any person to commit waste, &c. in lands, houses woods and gardens;* and in the end it is recited, *That the defendant hath committed waste, &c. in the lands only, or in the woods only, or in the houses only;* yet the writ is good.

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A If an abbot make a lease for life or years, and die, and the lessee afterwards commit waste, the writ shall be such: *The king, &c. If the abbot, &c. then summon B. &c. wherefore seeing that it is provided by the common council of, &c. the same B. hath committed waste, &c. of the houses in L. which the aforesaid abbot, &c. (if the abbot himself make the lease); and if his predecessor made the lease, then thus: Which R. formerly abbot, &c. the predecessor of the now abbot, demised to the aforesaid B. for the life of him the said B. or for a term of years, (if the case be so) &c. to the disherison of the church of him*

him the said abbot. And the like shall be for a prior or master of an hospital.

And against the executors the writ shall be: *Summon I. B. and K. executors of the will of L. that they be, &c. they the same executors have committed waste, &c. of the lands which the aforesaid A. demised to the aforesaid L. for a term of years, &c.*

And if a man make a lease to a feme sole of chases, and she take husband, and the lessee die, and she and her (a) husband commit waste; the writ for the heir shall be thus:

The king, &c. If A. shall make, &c. then summon B. and C. his wife, that, &c. Wherefore, seeing that, &c. they the same B. and C. have committed waste, &c. of the vivaries in L. which they hold for the life of her the said C. of the demise which F. the father of the aforesaid A. whose heir he is, made thereof to the said C. &c.

And another writ for the heir: where land is leased to husband and wife and the heir, and the husband dieth, and the wife committeth waste, the writ shall be: *She the same A. hath committed waste, &c. of the houses in L. which she holds for her life of the demise which W. made thereof to the same A. and the aforesaid B. some time her husband, and to the heirs of him the said B. father of the aforesaid H. whose heir he is, &c.*

And another writ: When a gift is made unto the husband and wife, and unto the heirs of the body of the wife, and the wife dieth, and the husband committeth waste, the heir shall have a writ of waste, and the writ shall be:

He the same A. hath committed waste of the houses in B. which he holds for his life of the demise which W. made thereof

(a) See 16 Ed. 3. 68. b. And if the father makes a lease to the feme for life, and dies, and the son confirms it to her and her husband for their lives; yet waste lies *quod teneat ad terminum* of their lives, *ex dimissione* of the son. 6 Ed. 3. 19. See 46 Ed. 3. 25. b. A feme lessee for life takes husband, waste shall be in the *tenet* as here, although they grant over their estate af-

ter the waste committed. But if a feme lessee *per auter vie* takes a husband and commits waste, and *cestuy que vie* dies, the writ shall be *quas le fem tenuit*. *Quære*, if she makes a lease for years; for in such case after the feme's death, waste does not lie against the husband in the *tenuit*. 10 H. 6. 11. *Quære*, if he makes the lease for years, *si eadem lex*.

to the aforesaid A. and M. some time his wife, and to the heirs of the body of her the said M. mother of the aforesaid B. whose heir he is, issuing, &c. contrary to the form, &c.

D And if a man lease lands for term of life and have three or four sisters, and die and they make partition of the lands and of the reversion, and the tenant for life commit waste; that sister and her husband who hath the reversion shall have a writ of waste and the writ shall be :

The king, &c. If A. of B. and M. his wife, shall make, &c. then summon, &c. F. Wherefore, seeing that by the common council, &c. the same F. hath committed waste, &c. of the houses, &c. in L. which he holds for his life of the demise of S of C. of the purparty of her the said M. allotted to her of the inheritance which was S.'s her brother's, one of whose heirs she is, by partition thereof made between them the said M. A. and B. the sisters of the said S. &c. Or thus : The same F. hath committed waste of the houses in L. which he holds for his life of the aforesaid M. of the demise of A. father of the aforesaid M. one of whose heirs she is, of the purparty of the same M. allotted to her of the inheritance of the aforesaid A. &c. And if tenant for term of life grant over his estate unto another, and the grantee commit waste, the writ shall be :

E *The king, &c. If B. shall make, &c. then summon A. &c. the same A. hath committed waste, &c. in the houses in N. which he holds for the life of I. (a) under a demise which the same I. to whom B. demised them for the same term, made thereof to the aforesaid A. &c. And if tenant for term of life grant over his estate, and the grantee grant over his estate, then the writ shall be thus :*

The king, &c. If M. of R. prebendary of the prebend of F. in the church of the blessed Peter of York, shall make, &c. then summon R. &c. Wherefore, seeing that, &c. the same R. hath committed waste, &c. of the houses in L. which he holds for the term of the life of A. who was the wife of

(a) *So ex legatione sive ex assignatione. Theol. Dig. lib. 10. cap. 5. §. 26. S. 10 H. 6. 8. Pl. Com. 10 Br. Waste. C. 2 Rol. Abr. 826. S. C. 132. S. C. Fitz. Brief 63. S. C.*

H. of N. of the demise of M. of O. who held them for the same term of the demise of them the said H. and A. to which same A. and to M. of O. her former husband, W. B. some time prebendary of the prebend aforesaid, predecessor of the aforesaid prebendary, demised them for the life of them the said M. of O. and A. to the disherison of the prebend of him the said R. and contrary to the form of the provision aforesaid, &c.

10 H. 7. 5.

And by that it appeareth, that if a prebendary or parson F make a lease for term of life, he or his successor shall have an action of waste. If M. lease lands unto I. for term of life, and die, and L. son and heir of the said M. grant the reversion unto H. in fee, and H. grant this reversion unto A. in fee, and afterwards the tenant for life commit waste; now the writ of waste brought by A. shall be such:

The king, &c. If A. &c. then summon I. &c. Wherefore, &c. the same I. hath committed waste, &c. of the houses in L. which he holds for his life of the aforesaid A. of the assignment of H. of whom the same I. held them for his life, of the assignment which L. son and heir of M. who demised them to the aforesaid I. for the same term, made thereof to the same H. &c.

If S. and K. his wife, seised in fee, lease the land unto G B. for term of life, and afterwards S. die, and K. take H. to husband, and K. grant the reversion unto A. in fee, and afterwards B. attorn and commit waste, and A. bring waste, the writ shall be:

The king, &c. If A. shall make, &c. then summon, &c. B. that he be, &c. the same B. hath committed waste, &c. of the houses in N. which he holds for his life of the aforesaid A. of the assignment which H. and K. his wife, made thereof to the said A. which K. and S. her former husband, demised them to the aforesaid B. for the same term, &c. If N. lease lands H for years unto F. which F. maketh I. his executor, and dieth, and I. lease the lands unto R. and afterwards N. grant the reversion in fee to P. and P. grant the reversion to M. in fee, and after R. tenant for life, commit waste; the

the said *M.* shall have a writ of waste, and the writ shall be (a):

The king to the sheriff, &c. If M. shall make, &c. then summon, &c. R. that he be, &c. wherefore, seeing that, &c. the same R. hath committed waste, &c. in the houses in L. which he holds for a term of years of the demise of J. executor of the will of F. to whom N. demised them for the same term, the said M. being assignee of P. of whom the said R. held them for the same term, under an assignment which the said N. there- of made to the aforesaid P. &c.

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A *F.* leased lands unto *E.* and *A.* his wife, and unto the heirs of *E.* and afterwards *E.* dieth, and *B.* his son and

(a) Note the form of the writ; *distrain A. to answer B. and C. his wife, wherefore by the common council, &c. the same A. hath committed waste, sale and destruction to the disherison of the said C. of the lands, houses, woods and gardens in M. which he holds for his life under a demise which D. who holds the tenements aforesaid of the aforesaid B. and C. made thereof to the aforesaid A. and E. his late wife, and the heirs of the body of the said E. issuing, so that if it happens the said E. shall die without heirs of her body issuing, then the said tenements shall remain to F. and his heirs; and which, after the death of the said E. who died without heir of her body, and which, after the death of the said F. ought to revert to the said B. and C. as their escheat, because the said F. was a bastard, and died without heir of himself, &c.*

Exception 1. That there was no privity between the plaintiffs and defendants, so as to say *in terris quæ de iis tenet; sed non allocatur per cur'*: For that by the escheat of the remainder the feignory is extinct; and the like of a tenure determined. And if *F.* was to bring the writ of waste, he shall not suppose a tenure, for that the lessee for life does not hold of him in remainder, and *a fortiori* not of the lord

who has the same remainder by escheat; and yet if he in reversion brings waste, he must suppose a tenure.

Except. 2. For that the writ is *Et quæ post mortem E. & F. reverti debeant*, where by the writ he supposes a lawful estate for life in *A.* the defendant, and so it is repugnant; *sed non allocat'*. For here he only conveys to himself a title to the reversion, and not *ad demesne*; and therefore this would be a good exception in a formedon, but not here. Also by ——— the writ is good, although those words *post mortem* had been omitted, and so it is surplusage.

Except. 3. For that it was *reverti debeat* to the husband and wife, where it should have been to the wife only; *sed non allocatur*. For it cannot revert to the wife without reverting to the husband: So in a *cessavit* or *formedon in reverter*.

Except. 4. For that it should have been laid, as escheated from the wife, and not from the husband and wife; *sed non allocatur per cur'*. 3 H. 6. 1, 2.

Yet note; The writ ought to be *ad exheredationem* of the wife, or else it shall abate. 8 H. 6. 9. a. See for this 27 H. 8. 13. Dyer 90. 18 Ed. 3. Fitz. Brief 835.

heir granteth the reversion unto C. in fee, and afterwards A. committeth waste, the writ shall be (b);

The king, &c. If C. shall make, &c. then summon A. &c. Wherefore, seeing that, &c. the same A. hath committed waste, &c. in the houses in B. which he holds for his life of the aforesaid C. of the assignment which B. the son and heir of E. (to whom and the aforesaid A. some time his wife, F. demised them, to hold to them the said E. and A. and the heirs of the same E.) made thereof to the aforesaid C. &c.

M. lease:h lands for life unto C. and A. her husband, B and A. dieth, and C. taketh to husband T. of F. and T. and C. his wife lease the lands unto P. of H. who leaseth the lands unto J. and afterwards M. granteth the reversion unto R. (a) (b) in fee, and J. committeth waste, and R. bringeth a writ of waste; the writ shall be such :

The king, &c. If R. shall make, &c. then summon J. &c. Wherefore, seeing that, &c. the same J. hath committed waste, &c. in the houses or lands which he holds of the aforesaid R. for the life of C. the wife of T. of F. under an assignment thereof made to the said R. by the said M. of whom P. of H. (who demised them to the aforesaid J. for that term) held them for the same term of the demise of the aforesaid T. and C. to which same C. and A. her late husband, the aforesaid M. demised them for the life of them the said A. and C. &c.

(b) R. leaseth lands unto Amice and J. her husband, for term of their lives, the remainder to N. daughter to J. D. for term of her life, the remainder to the right heirs of J. D. and afterwards T. (right heir of J. D.) granteth that remainder unto B. of C. in fee; and afterwards J. (husband

(b) See a good form of this writ by the assignee of a reversion against the assignee of a term, *Dyer* 208. viz. A. leases to B. for years and grants the reversion to C. who grants over to D. and B. grants his term to E. who commits waste in the houses, &c. which he holds for a term of years of the demise of B. to whom A. demised them for the same term, of the aforesaid L. of the assignment of C. of whom the same B. held for the same term, of the assignment which

A. made to him.

(a) *Contra*, if the reversion was granted for life, by *Hill and Parning*. 11 *Ed. Reſcit* 118. yet waste was against a tenant for years, living him in remainder for life. 27 *Ed.* 3. 87.

(b) See for this 20 *H.* 6. 36. That waste does not lie in such case, till after the death or surrender of the particular mesne estate. See *Co. Litt.* 54 a. But equity will interpose by injunction. 3 *Atk.* 95. 210.

of Amice) dieth, and she committeth waste; the writ of waste shall be such:

C *The king, &c. If B. of C. &c. shall make, &c. then summon, &c. Amice, who was the wife of, &c. Wherefore seeing that, &c. the same Amice hath committed waste, &c. in the woods, &c. which she holds for her life of the aforesaid B. of C. under an assignment which T. the cousin and heir of J. D. made thereof to the said B. of which T. the same Amice held them for the same term under a demise which R. made thereof to the aforesaid A. and J. her late husband, for the life of them the said A. and J. so that after the death of the same A. and J. the aforesaid woods should further remain to N. the daughter of J. D. for her whole life, and after the death of the said N. the same woods should remain to the right heirs of the aforesaid J. D. &c.*

(b) And by this writ it appeareth, that he in the reversion shall have a writ of waste against the tenant for life, where there is a mesne estate in remainder for life to another. Post 59 H. acc.

D There is another writ of waste in this form:

The king, &c. If J. and C. shall make, &c. then summon, &c. Isabel, &c. Wherefore, &c. the same Isabel hath committed waste, &c. in all the lands, &c. which she holds for her life by a fine thereof levied in our court before W. of C. and his companions our justices of the bench, by our writ between the aforesaid J. and C. and R. of P. and which after the death of the aforesaid T. and Isabel ought to remain to the aforesaid J. and C. and to the heirs of the bodies of the same J. and C. issuing by form of the fine aforesaid, &c.

E And if a man lease lands for term of life unto E. the remainder to M. for life, and afterwards grant the reversion in fee to one B. father of R. whose heir the said B. is; and afterwards the first tenant for life die, and the tenant in remainder enter and commit waste; now the writ shall be,

The king, &c. If R. shall make, &c. then summon, &c. J. of C. and M. his wife, &c. Wherefore, seeing that, &c. the

(b) See note b. in preceding page.

same J. and M. have committed waste, &c. in the lands which they hold of the aforesaid R. for the life of her the said M. of the assignment which J. of C. (who demised the land aforesaid to J. of E. for his whole life, so that after the death of him the said J. of E. the same lands should remain to the before-mentioned M. to hold for her whole life) thereof made to B. the father of the aforesaid R. whose heir he is, &c.

And there are other forms of writs in the Register, which F are not mentioned here for the length of them; *ideo quære librum.*

3 H. 6. 1.
nota.

21 Ed. 3. 3.
& 27. contra
16 Ed. 3.
West. 100.
contra.

And there is another form of writ of waste for the lord G by escheat, who hath the reversion by escheat, &c.

(a) And there is a writ of waste in the Register for him H in the reversion against tenant by *Elegit*, who hath lands and tenements in execution for debt or damages. And so against tenant by *Elegit*, who hath lands in execution by recognizance of debt: And also against his executor who hath lands in execution by *Elegit*. And it seemeth to stand with good reason, that the action doth lie.

But some say, that he against whom the execution is sued, shall not have an action of waste, because he may have a writ of *venire facias ad computandum*, &c. and there the waste shall be recovered in the debt; but by the action of waste he shall recover treble damages, and so it seemeth he shall not do by that writ of *venire facias ad computandum*.

(b) And also if a man hath lands in execution by *Elegit* and afterwards he in the reversion granteth the reversion unto a stranger in fee; that the grantee shall have an action of waste against the tenant by *Elegit* seems reasonable; because the waste is to his disinherittance, and he ought not to satisfy the debt due by the grantor.

(a) N. B. ante, 37 H. contra. So 19 Ed. 3. Waste 31. 16 Ed. 3. Waste 20. A *scire facias* was against a tenant by *elegit* who had cut trees, to pay the residue of the money, to answer for the trees cut, and for the plaintiff to have his land again. Cur': By the statute against cutting trees, this is in nature of a trespass, and lies

not in account. Nor is he punishable by this writ (of waste) but in an action on the case only. 21 Ed. 3. 26.

(b) See *supra*, and note, he cannot in a *scire facias* compel him to answer to the waste and cutting of the trees, and therefore it was waived. 21 Ed. 3. 30. b. See F. N. B. 104. noted that waste lies. *Quære.*

I And see 21 *Ed. 3.* in title *scire facias*, whether recognizer had a *scire facias* upon his surmise that the recognizee had levied all the debt by cutting of trees.

If a man have common of estovers in the woods of another, and he who is tenant and owner of the wood cut down all the wood, he who ought to have the estovers shall not have an action of waste, but shall have an (c) assise of his estovers: For the action of waste doth not lie but upon a lease made, or against tenant by the curtesy, or tenant in dower, or guardian.

[59]

A (d) If guardian in chivalry commit waste, the heir shall have an action of waste as well at full age as within age.

And if a man be in ward unto the lord by reason of the use of lands, because that certain persons were seised in fee of the lands holden by knight's service unto the use of his father and his heirs; now if the guardian commit waste, the heir within age, or of full age, shall have the action of waste against the guardian, and yet the heir hath not the reversion of the lands, but the use only. But that is given by the statute of 4 *H. 7. cap. 17.*

Note 12 *H. 4. 3.* per Hankford, in a writ of waste the writ doth not recite the statute, which proves that a prohibition was against the guardian at the common law.

And if the guardian do commit waste, he shall lose the wardship; and if the wardship be not sufficient to answer the damages for the waste, then he shall render damages unto the value over and above the loss of the wardship, by the statute of *Gloucester, cap. 5.*

B If the king commit the wardship of the heir in ward unto another, and the committee do waste; then upon a surmise made thereof in chancery, the king shall send a writ unto the escheator, to go to the land, and see if waste be done, and to certify the king thereof in the chancery.

(a) If escheators do commit waste in lands which they have in their hands in custody; the heir within age, or of full age, shall have an action of waste, and shall recover

(c) See 4 *Ed. 4. 2.* 11 *H. 4. 11.* *Ed. 3. Waste 100.* *Vide infra E.*
32 *Ed. 3. Waste 36.*

(d) Note; waste does not lie against guardian in socage, but only account or trespass, according to the nature of the waste. Adjudged 16

(a) How this may be presented in *B.* and answered at the king's suit, and how the king's grantee shall answer to the heir in such case, see 40 *Aff. 22.*

treble damages against them, and they shall suffer imprisonment two years at the least, at the king's pleasure. And so if escheators do commit waste in other lands seized into the king's hands by inquest of office. *Anno 36 Ed. 3. cap. 13.*

(b) And escheators or other guardians of lands, in the vacation of the temporalities of bishopricks or abbies, shall do no waste, &c. *Anno 14 Ed. 3. pro clero, cap. 4 & 5.*

And if tenant for term of life, or in dower, or by the curtesy, or for years, grant over their estate to divers unknown persons, &c. to defraud him in the reversion, and afterwards waste is committed; he in the reversion shall have an action of waste against the first tenant who took the profits, &c. *Anno 11 H. 6. cap. 5.*

1 Inst. 200. b.
West. 2. c. 22.

There is another writ of waste which lieth betwixt two tenants in common of lands, or a wood in fee-simple; and the form of the writ is such:

The king, &c. If A. shall make, &c. then summon, &c. B. to shew wherefore, seeing that the same J. and B. hold the wood of J. in N. in common, the aforesaid B. hath committed waste, &c. of the said wood to the disherison of him the said A. &c. And have you there, &c. And this writ lieth as well of lands, piscary, turbary, and the like, as of woods, when they are holden in common. See the statute of *West. 2. cum duo vel tres, &c. Turbariam, cap. 22.*

Supra A. B.

(d) The heir within age shall have an action of waste against the guardian in socage.

The heir at full age shall have an action of waste against the king's committee, &c.

22 H. 8. 25.
Newton ac.
28 H. 6.
Waste 9.

If two have a reversion unto them, and unto the heirs of one of them, they shall join in an action of waste against tenant for life.

(b) See *Roz. Parl. 8 Ed. 2. M. 9.*
(c) And although they hold but for life, and by several titles, yet waste *pro indiviso* lies. 21 *Ed. 3.*
(d) The heir in this case shall have account or trespass, but not waste. See 46 *Ed. 3. 17.* 7 *H. 6. 23.* 17 *Ed. 3. 7.* 7 *Ed. 3. 54.* 2 *H. 5. 7.*
29.

G (e) Guardian in socage shall not punish waste done by a stranger.

H (a) Waste shall be brought against tenant for life, where there is a mesne estate for years between the tenant for life and him in the reversion. 46 Ed. 3. 17.

And it appeareth by the Register, that the writ of waste shall be maintainable, although the mesne in the remainder for term of life be between the tenant for life and him in the reversion.

I (b) Where a lease is made unto the husband and wife for life or years, there the wife shall not be punished, after the death of her husband, for waste done by the husband. M. 3 Ed. 3.

K The tenant may cut trees to mend houses, &c. and to do reparations. But if houses decay by the default of the tenant, (c) to cut trees to amend them is waste.

L Where waste is done by the king's enemies, or by tempest, the tenant shall not be punished for the same.

M Cutting of dead wood is not waste. And if a man cut wood to burn, where he hath sufficient head-wood, it is waste. 2 H. 6. 10.

Also it is not waste to suffer lands to lie fresh, and not to manure them, and to suffer them to grow full of thorns, &c. (d) Also it is not waste to fell seasonable wood, which is used to be felled every twenty years, or within that time.

(e) If a man fell trees it is waste; and if he suffer the

48 Ed. 3. 16.
50 Ed. 3. 4.
10 Ed. 4. 9.
Choke contr.
42 Ed. 3. 22.
Belk.
2 H. 4. 3.
Old Nat. Brev.
36.
4 Ed. 3. Waste
22 cont.
7 H. 6. 33. ac-
40 Aff. 22.
20 Ed. 3.
Waste 32.

2 H. 6. 11.
7 H. 6. 38.
40 Ed. 3. 25.

9 H. 6. 66.
22 H. 6. 12.

(e) See 46 Ed. 3. 17. Perk. 113.
b. 4 Ed. 3. 16.

(a) See Bro. Waste 56. contra 48 Ed. 3. 16. 50 Ed. 3. 4. 11 Ed. 3. 3. 9. Perk. 8. 7 H. 6. 36. nota bene.

(b) See the contrary, Kelw. 113. 19 Ed. 3. Breve 246. but 11 H. 4. 3. per Cur'. 19 H. 6. 5. seem to accord.

(c) Contra, if ruinous at the time of the lease made. Dyer 36. See 12 H. 8. 1.

(d) See 11 H. 6. 1. Oaks cannot be said seasonable wood, which are

passed the age of 20 years, but by a custom in any place, where is plenty of wood (timber) oaks under 20 years may be seasonable wood. And such custom may be alledged in the wood itself, without saying, *In such a town or hundred such a custom is bad, &c.* 4 H. 6. 1. Rast. Entr. 69. See 40 Ed. 3. 25. 11 H. 6. 5.

(e) See waste assigned in permitting wood to be uninclosed, whereby the cattle eat the germins. 11 H. 6. 1. 22 H. 6. 12.

germins

germins upon the roots of the trees to be again newly destroyed, the same is new waste (*f*).

And if a man do not repair the banks, by reason **N** whereof the land is drowned, the same is waste.

And if a man plough meadow, &c. it is waste. **A** wall or pale, which is (*g*) covered, with thabe or timber, may be waste, if the tenant suffer them to be uncovered, by reason whereof, &c. And the digging of gravel, or stone, or coals, shall be said waste (*h*).

House-bote, hay-bote, and fire bote, do appertain unto a termor of common right, and he may (*i*) take wood for the same. *H. 21 H. 6.*

See 57 E.

A bishop, or a master of an hospital, or a parson, shall **O** not punish waste done in the time of their predecessors. But an abbot or prior shall.

Tenant in tail, after possibility of issue extinct, shall not **P** be punished for waste.

[60]

Cutting down willows in the sight of the manor is ad- **A** judged waste. *P. 40 Ed. 3.*

50 Ed. 3. 3.

Lessee for life, remainder in tail, the remainder in fee **B** unto the lessee for life, if he do commit waste, he shall be punished by him in the remainder in tail; and yet the lessee for life hath the remainder in fee, but there is a mesne estate of inheritance, &c.

14 H. 4. 11.
38 Ed. 3. 7.
Graunge to the
value of 40 s.
wasted, and yet
no waste, say
they.

(*a*) If a man cut trees of the value of three shillings and **C** four pence, it hath been adjudged waste.

If a man make a lease for one year, or half a year, and **D** the tenant do waste, the lessor shall have waste, and the

(*f*) And treble damages shall be recovered for both, yet he cannot recover *locum vastat*, 22 H. 6. 12.

(*g*) And it ought to be shewn so covered in the assignment of the waste. *Dyer 108. 22 H. 6. 24.*

(*h*) See 5 Co. 12. a. 2 H. 4. 2. 1 H. 7. 14. 12 H. 8. 1.

(*i*) *Viz.* Oaks, elms, ash, &c. for repair of the house, and under-wood, &c. for inclosures and firing; but note; oak, elm, ash, are not under-

wood, 21 H. 6. 46. which ought to be shewn by the defendant in a writ or action of waste. *Dyer 19.*

Sir *W. W.* The cutting of oaks of the age of seven years is not waste, by *Brian*, 13 H. 7. 21. But *Newton*, 22 H. 6. 47. said the termor cannot cut either oaks or ash for fire wood.

(*a*) That many petty wastes are punishable together, see 14 H. 4. 11. 9 H. 6. 66. *infra P.*

writ

writ shall say, *Which he holds for a term of years*, and in the count he shall shew the special matter. *Quere Litt. 14.*

E (b) A termor may cut the under-wood growing under the great woods and tall woods; but if there be not any tall wood, then he cannot cut the wood. *P. 41 Ed. 3. 25. 42 Ed. 3. 6. 10 H. 7. 2.*

F And a man may have action of waste, and count upon divers leases. *M. 44 Ed. 3. 17. See 34 H. 8. 12.*

G (c) The guardian shall not be punished for waste done by a stranger, &c. but a termor shall, &c. *44 Ed. 3. 17.*

H (d) If tenant in tail lease the lands for his own life, he shall have an action of waste against the tenant, if waste be done.

I (e) The grantee by fine of the reversion shall not have a writ of waste against the tenant before the tenant attorn: But if a reversion escheat unto the lord, he shall have waste against the tenant without attornment. *Lit. 131.*

And so if the king grant the reversion by letters patent, the grantee shall have waste without attornment. *34 H. 6. 51. 6 Ed. 3. 17. Attorn. 13.*

And so if a man devise the reversion unto another in fee, upon waste done the devisee shall have waste without attornment. *12 Ed. 4. 3.*

K (a) And none shall have an action of waste, but he who hath an estate in fee-simple or in fee-tail. But a parson or prebendary shall have a writ of waste upon their lease; yet some say, that they have not the fee-simple in themselves alone. *10 H. 7. 5.*

(b) Waste in topping and lopping twenty ashes and twenty elms, and on a demurrer adjudged for the plaintiff. *Dyer 65. a.* But if the assignment be in cutting down and selling twenty oaks, &c. and the defendant pleads no waste made, the plaintiff cannot give in evidence lopping of oaks. *Dyer 92. a.*

(c) But if the lessee himself commit waste, or command another to do

it, as to cut trees, &c. the lessee may plead this in bar of waste, but then the lessee shall be barred of his action of trespass for ever. *5 H. 4. 2. b. 2. H. 7. 14. b.*

(d) See *1 Inst. 345. Litt. 145. contr. quere 2 H. 5. 7.*

(e) See *34 H. 6. 6. 5 H. 7. 19. Nat. Brev. 269.*

(a) See *Fitz. Waste 5. Litt. 145. Nat. Brev. 36.*

(b) And

45 Ed. 3. 9.
Thorp, acc.

(b) And if tenant for term of life commit waste, and afterwards alien in fee, yet the writ of waste lieth against him: otherwise it is if the waste be done after the alienation made, as is said: *tamen quære.* 10 H. 7. 1. 25 Ed. 3. 36, 63.

3 H. 7. 11. and
5 H. 7. 24.
for the reason
of the case.
21 H. 6. 3.
22 H. 6. 2.

If an abbot commit waste in lands which he hath in ward, and die, the successor shall not be charged. But if he be deposed, the successor shall be charged. M. 49 Ed. 3. See 43 Ed. 3. 8.

A writ of waste shall be maintainable against one upon a lease made unto him, until he be promoted unto a benefice, and the writ shall suppose, *that he holds for term of life.* And so of a lease made to endure from such a feast unto (c) such a feast, the writ shall suppose, *that he holds for a term of years* in that case, and by the court the special matter shall be shewed.

(d) Destruction of villians by tillage, adjudged waste. O

(e) Waste done by a guardian unto the value of twenty pence, was adjudged waste, and the plaintiff recovered. H. 34 Ed. 3.

40 Ass. 22.
Waste 24. by
Knevit. A
house which was
newly built and
not covered,
was abated by
the guardian,
and no waste.
But if a frame
which was once
covered in the life of the lessor, if the lessee do erase it after his death, the heir shall have waste.
45 Ed. 3. 3, 20. Ant. 39. D.

The termor is not bound to repair the houses which are ruinous at the time of the lease made unto him. 49 Ed. 3. 2.

If two coparceners lease lands for life, and waste be committed, and afterwards one of them die; the aunt and the niece ought to join in an action of waste for the waste

done

(b) But for waste done before the surrender (no) action (of waste) lies; *quære.* 21 Ed. 4. 31. 8 H. 5. 8. 14 H. 14. a. 19 H. 6. 66. And the writ in that case shall be in the *tenuit*, 14 H. 6. 14. as some held. But by others it shall be in the *tenet*, whether he be tenant for life or years; but if the lessor enters with tort on the issue, the action is suspended for waste done before the entry. 8 H. 6.

10. and he shall be summoned on the same land. 21 H. 6. 57. a.

(c) See 14 H. 8. 11. Litt. 14. 7 H. 7. 2. 46 Ed. 3. 31.

(d) So if villians by reason thereof go out of or leave the seignior, it is exile, and punishable in waste; *contra*, if only manumitted, &c. 2 H. 6. 11. a. 14 H. 4. 11.

(e) See 12 H. 8. 1. 7 H. 6. 38. *supra* C.

done

done before ; and yet the niece shall (f) not recover any damages for the same, but the place wasted ; and it seems they shall hold the same in coparcenary. *M. 11 Ed. 3.*

If there be two coparceners, and one have issue, and die, and her husband be tenant by the curtesy, and commit waste, his (g) son shall not have an action of waste against him without naming the other coparcener : but if he bring such (a) writ, it shall abate, *Quod vide P. 2 H. 6. title Waste.*

S If there be tenants in common *pro indiviso*, and one commit waste, the other two ought to join in an action of waste against the third. See for that *M. 3 Ed. 2. Waste.*

T If the guardian commit waste, and the heir being within age, bring an action of waste, the guardian thereby shall lose the wardship, and damages for so much as is wasted, besides the value of the wardship which is lost ; but if the heir (b) at full age do bring a writ of waste against him who was guardian, and recover, then he shall recover treble damages against the guardian, because the same is out of the statute of *Gloucester*, which saith, that the guardian shall lose the wardship ; for he cannot lose the wardship there ; and therefore he is not in that case as tenant in dower or by the curtesy are, who were punishable in waste by the common law. *Quod vide M. 12 H. 4. 3. in the title of Waste, the opinion of Thirning.*

(f) See 11 Ed. 2. *Waste* 115. 45
Ed. 3. 3. b. 11 H. 4. 16. b. 48
Ed. 3. 14. b. 35 H. 6. 23. b. *Kelw.*
105. a. *Nat. Brev.* 101. 22 H. 6.
12. 49 Ed. 3. 2.

(g) See 9 H. 6. 11. b. *Dubitatur*,
but *Kelw. fol.* 103. a. case 64. that
the issue alone shall have it. 15 H.
7. 14.

(a) See 9 H. 6. 11. 50 Ed. 3. 3.
ante 39. D.

(b) Note ; One shall not recover
costs on the statute of *Gloucester*. 30
Ed. 3. 27. b. 2 H. 4. 17. b. 12 H.
4. 4. 5 H. 5. 13. a. 9 H. 6. 66. b.
14 H. 6. 13. a. *contr.* 5 Ed. 4. 7. a.
See *Kelw.* 26. the stat. 289.

(c) *Writ of Estrepment.*

3 H. 6. 16.

Variance from the first record for the recital of the name, town or the like, shall not abate the writ, because it is original, not judicial. 3 H. 6. 16. No age in this writ, for it is in nature of trespass, and no

process of outlawry, for that it is a preeyre. 14 H. 7. 10. If the defendant plead in arrest of judgment, or release be pleaded after verdict, or if the justices take advice of their judgment, the party may have estrepment, by Read, 2 H. 6. 13. 4 Eliz. Dyer 210.

U
THERE are two manner of writs of estrepment: U
one is when a man hath a real action depending, as *a formedon*, or a *dum fuit infra ætatem*, or a (d) writ of right or (d) such action wherein the demandant shall not recover damages; then he may sue this writ of estrepment against the tenant, inhibiting him that he do not make waste nor strip, pendant the action: and this is properly before judgment is given for the demandant.

And another writ of estrepment lieth for the demandant, where he hath judgment (e) to recover seisin of land, and before execution sued by *habere facias seisinam*, he may sue this writ, that the tenant do not waste or strip: and this writ doth recite the recovery and the judgment, &c. And also the demandant may have a writ of estrepment di- X

(c) See *Rot. Parliament.* 28 Ed. 3. 19. A petition that this writ may lie in every action where the party is to recover damages. *Resp. Lex antiqua serviar.*

(d) See 14 H. 7. 7. a. b. and Dyer 210. b. In a *quid juris clamat*, pending the writ, and also between the judgment and execution, in Dyer, *Catesby's case.* *Dubitatur* in a writ of dower, where the husband did not die seised. *Tr.* 6 Eliz. Mo. 69.

(e) See 21 Ed. 3. 51. b. The demandant had judgment in a *scire facias* on a fine against B. and sues an estrepment, and found pledges to pursue as he ought against B. and C. and others of an estrepment made between judgment and execution; all

demand and had oyer of the record, and demand judgment, seeing they were not parties to the record, and C. pleads, that B. was his tenant for life, and concludes to the inquest; whereas he might have pleaded in bar, that he was not comprised, and was amerced for his feint plea, &c. Note; The plaintiff did not dare to demur, but tendred an issue, viz. comprised, and the others *contra.* 22 Ed. 3. 2.

So note; The record may be falsified in this writ. Note; There shall no judgment be given in estrepment, till the special plea determined. 3 H. 6. Judgment 4. See judgment therein for damages, *Pas.* 19 Eliz. *Rot.* 841. *Bendl.* 220.

rected

rected to the sheriff, commanding him that he do not suffer the tenant to do waste or strip.

Y And some say, that this writ of estrepment doth not lie in such action where the demandant shall recover damages against the tenant. But it seemeth reasonable, that the demandant have such writ where he doth recover damage, as where not: For it may be that the tenant is not of ability to satisfy the demandant for his damages. And also if the tenant shall be suffered to let the houses to fall to decay, or to pull them down, and to destroy the parks and chases, it should be very inconvenient.

14 H. 7. 7.
Na. Br. 40.
[61]

A And in every real action the demandant may have a writ unto the sheriff, commanding him that he see that the statute which ordaineth estrepment be observed; and that he do not suffer the tenant to do such strip: and by the like reason he may have the writ against the tenant, where he may receive damages, &c.

28 H. 6. 8.
Qu. 22 Ed. 3. 2.
Estrepment 9.
Estrepment
brought against
the defendant,
and a stranger to
the recovery.

B (a) And if the tenant do make a feoffment hanging the plea, the demandant may have a writ of estrepment against the tenant and against his feoffee, &c. And by the same reason it seemeth, that he may have a writ of estrepment against the tenant and those who are his servants, naming their names, &c. (b) although they have nothing in the tenancy: *Quere tamen. Vide T. 5 Ed. 2. Tit. Estrepment.*

C In an assise, and in every real action where the demandant shall recover damages, he may have a writ of estrepment for strip made after the judgment, and before execution: but for corn cut and carried away after judgment, and before execution sued forth by the demandant, the demandant shall not have a writ of estrepment: *Quere* what remedy he shall have: It seemeth none; for the tenant may take the profits of the lands before execution, as I think, for it shall not be said estrepment, if not that the tenant do such a thing, which shall be said waste if a termor had done it.

6 H. 4. 2.
34 Ed. 3.
Estrepment 15.
15 Eliz. Dyer
325.

(a) See *infra*, H. 22 Ed. 3. 2, 3. law. 22 Ed. 3. 3.

(b) And this was so at common

18 H. 8. 5.

Note; A man cannot have this writ between the award of the writ and the return; for the statute giveth it pendent the writ, and it is not pendent till returned.

See 12 R. 2.

Estrepment 6.

By Charlton, he shall not recover damages for waste before the judgment against the tenant of the land.

And when a man purchaseth his original writ directed to the sheriff, then may be purchased his writ of estrepment against the tenant, if he will; or a writ unto the sheriff, commanding him to see that the statute which ordained the estrepment be observed. D

And if a man sueth a writ of right unto the lord of a court baron, there he may sue a writ out of the chancery directed to the sheriff, that he see that waste be not done, &c. or he may sue a writ out of the chancery directed to the party himself, commanding him that he shall not do waste, &c. and an attachment thereupon. And when the writ is depending in the common pleas then the demandant shall have the writ of estrepment out of the common pleas or out of the (a) chancery, at his election. E

3 H. 6. 13.

And the writ may be directed unto the sheriff, and the party; or he may have several writs, one to the sheriff, and the other to the party. F

3 H. 6. 16.

12 R. 2.

Br. Estrepment 13. they were at issue, if it were before the delivery, or after.

33 H. 6. 6.

14 H. 7. 7.

2 H. 6. 13.

And hanging the action the tenant may do waste, and shall not be punished, because it is before the prohibition delivered unto him; but only for that waste done after the (b) prohibition delivered. G

(c) And if a stranger of his own wrong do waste after the prohibition delivered unto the tenant, and against the tenant's will, then the tenant shall not be punished for that waste, &c. H

In a *scire facias* to execute a fine, if the tenant do commit waste, the demandant may sue a writ of estrepment, &c. I

(a) 2 H. 6. 13. a. 33 H. 6. 86. a. contr. 33 Ed. 3. Brief 917.

(b) But the defendant shall not be imprisoned for a waste done after, except the writ was directed to him; adjudged in a case between the Earl of Cumberland, and the Countess Dowager. 16 Jac. 1.

(c) In an estrepment against an infant, who is in by descent, he shall not

have his age by award, because he is to answer for the contempt. 2dly, For waste done after the prohibition by his guardian in socage, without his command, he shall not be punished, for the prohibition extends only to waste done by himself; yet a tenant for life shall be charged in a writ of waste, for a waste done by a stranger. 3 H. 6. 17. See 28 H. 6. 8.

In

- K** In an assise the tenant did (*d*) waste after verdict, and before judgment given, and afterwards the plaintiff had judgment, and afterwards sued a writ of estrepment against the tenant for the waste done by him after the verdict and before judgment; and it was awarded, that the writ was well brought. *H. 21 Ed. 3.*
- L** And a writ of estrepment against the tenant for waste done after the judgment, and before execution, was maintainable at the common law before the statute. *33 H. 6. 6. cont. by some.*
- M** And if a *formedon* be brought of a manor, and after the estrepment be brought against the tenant, and afterwards a tenancy escheat unto the manor, and the tenant do commit waste in that manor, he shall be punished for the same, and yet it is not demanded by the writ, but sureties were demanded by the writ in the name of the manor, and the land cometh in lieu of the services, &c. *15 Eliz. Dyer 325, ac. 4 Ed. 3. 32. Br. Estrepment 12.*
- N** If a man do recover in a writ of waste, he shall have a writ of estrepment against the defendant for waste done after the judgment, and before the execution. *7 H. 4. 16. 14 H. 7. 10. Cutler and Keble. 21 Ed. 3. 3. Br. Estrepment 7.*
- O** In attaint in the common pleas the plaintiff shall have the writ of estrepment against the defendant out of the common pleas, if he will, or out of the chancery. *2 H. 6. 13. 21 Ed. 3. 3. Br. Estrepment 14. 5 Ed. 2. Estrepment 11. Joint-tenancy at the original is a good plea; otherwise to say, that he was joint-tenant at the time of the judgment given.*
- P** If a man sue a *juris utrum* against several tenants, as he may, or a *scire facias* against several tenants, there he may have an estrepment against any of the tenants, and not against them all. And so it seemeth if a *formedon* be brought against two tenants jointly, the demandant may have an estrepment against one tenant only.

(*d*) See it adjudged, that he shall have a writ of estrepment in such case, *21 Ed. 3. 51. b. 14 H. 7. 7. a. b.* Yet it is held, he may have a writ to the sheriff to inquire of the damages for the waste done between the verdict and judgment, and upon the inquest, the other shall be put to answer the damages. *21 Ed. 3. 3. a. 21 Ed. 3. 51. Note;* The writ which was

prayed was a *Venire facias* to answer to the estrepment, and it was granted; so that it seems no prohibition preceded. See *14 H. 7. 7.* for a *scire facias* before a writ of estrepment granted, but if the tenant does waste after a view, and before judgment, a *scire facias* lies on a surmise thereof, or a writ of estrepment. *6 H. 4. 1. b.* See the *Register 77. b.* among the notes.

And

And in a *juris utrum* sued in *London*, a man shall have a writ of estrepment directed to the sheriff of *London*, as appeareth by the Register. Q

Writ de Partitione facienda.

THE writ *de partitione facienda* is such (a):

The king, &c. If A. shall make you secure, &c. R
 summon B. &c. to shew wherefore, seeing that the said A. and B. hold together and undivided three acres of land with the appurtenances in I. of the inheritance which was M.'s, the mother of the aforesaid A. and B. whose heirs they are, she the same B. opposes making partition thereof between them according to the law and custom of our kingdom of England, and does not permit it to be made, unjustly, as it is said, and have you there the summoners and this writ. *Witness*, &c.

9 H. 5. 15.
Quere, if parceners of lands in tail shall have a writ of partition.

And if the husband hath one part of the land by purchase, and the other parcel in the right of his wife, and another coparcener hath another part as one of the heirs of the common ancestor; then the husband and the wife shall have a writ of partition against the third coparcener, and the writ shall be such: S

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The king to the sheriff, &c. If I. and Mary his wife shall make, &c. summon Margaret, &c. to shew wherefore, seeing that the said I. as in right of her the said Mary, of her purparty happening to her of the manor of T. which was A.'s, the father of the aforesaid Mary, one of whose heirs she is, and the same I. by virtue of a feoffment made to him by F. another daughter and heir of the aforesaid A. of the purparty of her the said F. happening to her of the same manor, and the aforesaid Margaret, the daughter and third heir of him the same A. hold together and undivided the manor aforesaid with the appurtenances, she the same Margaret opposes making partition, &c.

(a) If he counts of an estate-tail in the ancestor, it is sufficient without shewing the commencement there-

of, for in this writ the land is not in demand, but only the possession affirmed (or ascertained) *Dyer* 79. b. And

A And there is a rule in the Register such, that is to say, that *Anno* 12. at *York*, was sealed a writ *de partitione facienda* betwixt strangers; and there it was said, that a man should have the same in every case without *de hæreditate* in the writ: and it is there said, that that writ was never seen before. 34 Ed. 3.
Partition 14.

B And if a man will sue a writ of partition for lands in *London*, then he shall have a writ unto the mayor and sheriffs of *London* in the nature of an *audita querela*, and the writ shall be such:

(a) *The king to the mayor and sheriffs of London, greeting: It is shewed unto us, on the behalf of G. of H. and I. his wife, that whereas they and R. and S. hold, together and undivided, one messuage with the appurtenances in London, the same R. and S. oppose making partition thereof according to the law and custom of the same city, and permit not the same to be made, to the no little damage and grievance of them the said G. and I. and contrary to the custom hitherto used and approved in the same city: therefore we command you, that having heard the complaint of them the said G. and I. in this matter, and having called before you R. and S. and heard the reasons of the parties on each side, you further cause to be done to the same G. and I. in the premisses, that which of right, and according to the custom of the city aforesaid, should be done, and in the like case hath hitherto been used to be done. Witness, &c.*

C And by that it appeareth, that by the custom of *London* one joint tenant, or tenant in common, shall have a writ of partition against his companion.

And partition may be made in the Chancery, where one of the coparceners is in ward to the king. 38 H. 6. 9.

D And partition may be made of an advowson or of a reversion, that one shall have the reversion of such acres, and another shall have the reversion of other acres; and such partition may be without deed. *6 Ed. 3. 47.* 11 H. 4. 61.
28 H. 6. 2.
9 Aff. 23.
3 Ed. 4. 9, 49.
45 Ed. 3.
Partition 7.
Vide St.
31 H. 8. c. 1.
32 H. 8. c. 12.

E And it appeareth in *3 Ed. 4.* that tenants in common may make partition by deed.

F

(a) This writ is very inaccurately and hath been corrected from the Reprinted in the preceding editions, gister 76. b.

9 H. 6. 5, 7.
19 H. 6. 25.
2 H. 7. 5. ac.
47 Ed. 3. 24.
3 Ed. 4. 9.
19 H. 6. 25.
that they cannot.

21 Ed. 3.
Partition 9.

21 Ed. 3. 31.
Partition 10.
Thorpe.
The remedy is only by scire facias.

10 Ed. 1.
Partition 21.
Co. Lit. 4.
Hil. 34 Ed.
Welden and
Bridgwater's
Case ac.
Co. Lit. 4. a.

And partitions betwixt husbands and wives shall bind the wives, if they be equal. And by partition made of a manor without speaking of the advowson, the advowson doth remain in common. And joint-tenants do make partition of a mill without deed, and adjudged good. *Trin. 47 Ed. 3. 5 H. 7. 22. 7 Aff. 19. 45 Ed. 3. 12.*

(a) If one coparcener doth lease her part unto another coparcener for years, yet she shall have a writ of partition against her sister during the term of years. *22 Ed. 3. 57. [17.] Dyer 52.*

After partition in the chancery, she which is within age, after she cometh of full age, if she have too little, shall have a writ *de partitione facienda* against her sister; or a *scire facias*, upon the record of the partition in the chancery, against her coparcener, which shall be returned into the chancery, &c. to shew wherefore new partition or extent shall not be made, &c.

And partition betwixt coparceners, that one shall have the occupation of the land from *Easter* until *August*, solely and in severalty to herself, and then that the others shall occupy the lands solely and severally from *August* to *Easter*, yearly to them and their heirs, is adjudged a good partition in the time of king *Ed. 1. Co. Lit. 167. b.*

And by the same reason it seemeth a good partition, if two coparceners have two manors by descent, and they make a partition, that one shall occupy one manor one year, and the other the other manor for that year, and then that he who occupied one manor one year, should occupy the other manor for the year following; and so they and their heirs shall change every year, and occupy the manor which the other coparcener did occupy the year before.

(a) See *21 Ed. 3. 57. a. b.* In a *partic' faciend'*, by *A.* against *B.* who pleads, that the plaintiff had leased to him his purparty for five years, and that, saving to him his said term, he is ready to make partition, and always has so been, and his protest was entered on the roll. *Skipw.* to have damages, replied, that he had not been always ready, *et non alocat-*

tur. For although he counts *ad damnum*, yet no damages shall be recovered, and therefore a partition was awarded with a saving of the term, and by *Candish* the like law is in a *nuper obiit*, account, *Perambulatione facienda*. But by *Strange* and *Martyn*, the plaintiff shall recover damages. *7 H. 6. 35. b.*

And

L And also coparceners may make partition for term of life, or for years. 20 H. 6. 13. Lit. 57.

M And also partition, that one shall have the land which is intailed, and the other the fee-simple land, is a good partition; and the process in this writ is *Sum'*, *Attachment* and *Distress* infinite (a). V. 57 Lit. ac.
20 H. 6. 14.
See 8 and 9 W.
3. c. 31.

(b) Writ de Excommunicato capiendo.

N BEFORE this writ shall be granted, the contumacy and contempt made by the party unto holy church ought to be certified into the chancery by the bishop by letters under his seal. But this certificate by letters may be made into the chancery by a bishop elect, before he be consecrated: and also the same may be certified by letters of the chancellor or vicar-general, when the bishop is beyond the seas, or out of his diocese, *in remotis agend'*, &c. And although the bishop be in his diocese, yet the certificate of the vicar-general by his letters unto the chancery, reciting that the bishop is *in remotis agend'*, is good, and shall not be traversed. And in time of vacation of the bishoprick the certificate ought to be made by the guardians of the spiritualties for the time being, or by the archbishop, &c. if he be guardian of the spiritualties. 20 H. 6. 1.
Not good by his
ordinary seal.
8 H. 6. 3.
The archdeacon
doth certify,
and it is said,
that he was or-
dinary imme-
diate, and yet
it is doubted
whether good or
no, because the
king cannot
have benefit to
seize temporal-
ties, for that he
hath not tem-
poralties as a
bishop hath.

O And upon this writ he shall have an *alias* and a *pluries*, and if they are not answered, an attachment against the sheriff, directed unto the coroners, returnable in the king's bench.

(a) If there be lord, three coparceners mesnes, and a tenant (of the mesnalty) and one of the coparceners purchases the tenancy, this is not only a partition of the mesnalty being thereby extinguished for a third part, but it is also a division of the feignory paramount; for now the lord must make several avowries. See 36 H. 6. 7. Co. Lit. 167. b.

(b) Pas. 24 Car. 2. B. R. (L. R. 130.) Note; By Hale, the sheriff cannot break the house on an *Excom' capiendo*. But see 4 Ja. 1. c. 4. s. 35. whereby the sheriff is authorized to break open a house to take a *recusant* excommunicated.

And if the excommunicate hath made satisfaction unto **A** the church for his contumacy and contempt, &c. then the bishop or vicar-general, or the guardian of the spiritualties, &c. as before is said, ought to certify to the king in the chancery, that the party hath made satisfaction unto the church for the contempt, &c. and thereupon he shall have such writ to the sheriff, viz. (a)

The king to the sheriff of Lincolnshire, greeting: Whereas S. and I. upon whom by the denunciations of the dean and chapter of the church of the blessed Peter of York (the see being vacant); or thus, by the denunciations of the venerable father A. bishop of Winchester, as excommunicated persons, and contemning the keys, we commanded to have justice done by you by their bodies according to the custom of England, until they should make satisfaction to holy church, as well touching the contempt as the injury to it by them committed, from them the dean and chapter; or thus, from him the said bishop have deserved to obtain the benefit of absolution in form, as they the said dean and chapter have signified to us by their letters patent; or thus, as he the said bishop hath signified to us, &c. We command you, that without delay you cause that they the said S. and I. be delivered out of the prison wherein they are detained, if they are detained in the same for that and no other cause, &c.

And if the sheriff will not execute that writ, he shall **B** have an *alias* and a *pluries*, and attachment against the sheriff, directed unto the coroners, returnable into the king's bench.

And if the party excommunicated, who is so taken and **C** in prison, offer sufficient caution or surety, to abide the ordinances and rules of the holy church, and the judges there, and the ordinary do refuse to take such caution or surety, then he may have another writ unto the bishop to admit of his caution, and the writ is such:

(a) See *Lib. Parl.* 25 Ed. 3. n. 31. A petition, that no *excommunicato cap'* shall issue before a *scire facias* against the party, to know whether the case be lay, that so the party may reverse it, if the matter be lay, or shew the matter where the *excom' cap'* is plead-

ed against him: but it seems the keepers of the king's conscience at that time were such, that both were there denied. Though it is hoped mankind will at length have their eyes opened to see the mischiefs occasioned by this writ. *W. Bobun.*

(b) *Writ de Cautione admittenda.*

TH E king to the venerable, &c. Whereas we commanded A. as one by your denunciation excommunicated, and contemning the keys of the church, to have justice done to him by his body by our sheriff of Lincoln, according to the custom of England, &c. until he should have made satisfaction to holy church, &c. It is shewed unto us, on the behalf of the said A. that although the same A. hath frequently offered to you fit caution to obey the commands of the church in form of law, that he might by this be able to obtain the benefit of absolution: nevertheless you have hitherto refused to admit from him such caution, at which we wonder: and because we will not that the same A. be longer detained in prison contrary to justice, we command you, that having accepted the caution aforesaid from the aforesaid A. you command him the said A. to be delivered from (a) the prison wherein he is detained by occasion of the premisses, otherwise we ourselves will execute that which is ours in this behalf.

D And if the bishop will not send unto the sheriff to deliver the person so excommunicated, then he shall have such a writ out of the chancery for to deliver him.

The king, &c. On the behalf of A. who by the denunciation of the venerable, &c. and rehearse the writ sent before unto the bishop for deliverance of the prisoner, &c. And because we will not that the same A. be detained longer in prison contrary to justice, we command that you go in your own person to the aforesaid bishop, and on our behalf advise and effectually direct him, that having accepted the caution aforesaid from the same A. he command him the said A. to be delivered from the prison aforesaid. And if the said bishop or the keeper will not do it in your presence, then do you cause him the said A. to be delivered out of the prison aforesaid, if he be de-

(b) See Bacon of Government 113. touching this writ.

(a) See Rot. Claus. 7 H. 3. (5) m. 2. tunc, &c. *infra ecclesiam absolvere vetitis.* Quære the Canons Temp. H. 1.

tained in the same for that and no other cause. Witness, &c.

And upon this writ he shall have an *alias* and a *pluries* E unto the sheriff; and if he do not serve the writs, he shall have attachment against the sheriff, but so shall he not have against the bishop, &c.

And if the bishop certify by his letters into the chan- F cery, that he hath sent unto his official or archdeacon to absolve the party excommunicate, then the party shall have a writ unto the sheriff rehearsing these letters, &c. *We command you, that without delay you cause the aforesaid A. to be delivered out of the prison wherein he is detained, when it shall appear to you that he is absolved from his excommunication by the aforesaid official or archdeacon, if he be detained in the same for that and no other cause. Witness, &c.*

And upon that writ he shall have an *alias*, *pluries*, and attachment against the sheriff, if he do not serve the writ.

And yet it seems that the official or archdeacon to G whom the bishop hath sent his letters to absolve the party, is not bound to certify the sheriff, that he hath such letters; but the sheriff ought to go or send to them to know the truth thereof, and thereupon to deliver the party: and the bishop, or he who excommunicated him, and upon whose certificate the party was taken, may command the sheriff to deliver him, as it appeareth by the writs in the Register.

And if a man be excommunicated, and taken by a *signi-* H *ficavit*, and after offer caution unto the bishop to obey the church, and the bishop do refuse, for which he sueth a writ to the sheriff to go unto the bishop, and to warn him to take caution, &c. now if the bishop think in his conscience, or stand in doubt whether the sheriff will deliver him by that writ, the bishop may purchase another writ directed to the sheriff reciting the case, and in the end thereof, *We command you, that by no means you deliver him the said A. from the prison aforesaid, unless at least he offer caution by pledges in your presence to satisfy the same bishop, without*

without the special mandate of us or of him the said bishop in this behalf. *Witness, &c.*

A And if the bishop do take caution of the party to obey holy church, then the bishop may certify the same into the chancery, and thereupon the party shall have a writ unto the sheriff to deliver him.

B And if the sheriff do deliver such persons excommunicate without order of law, then upon complaint of the bishop into the chancery, he shall have a new writ unto the new sheriff rehearsing the matter, commanding him to take the said person, and to detain him in prison; and also in the same writ he shall command the sheriff to make the old sheriff to answer the king in his bench for the contempt: and if the sheriff who setteth the party at large be yet sheriff, then it seemeth the writ shall be awarded unto the coroners to apprehend the party excommunicated, and to cause the sheriff to appear, &c. as before is said.

1 Lutw. 123.
Register 67.

C And if a man be excommunicated before the chancellor of Oxford, &c. and the chancellor certify this excommunication into the chancery, &c. upon the same certificate the king shall award a *significavit* unto the sheriff to apprehend the party; and the writ shall be such: *Whereas of our especial favour we have granted, (a) that the chancellor of the university of Oxford for the time being may signify and certify by his letters patent to our chancellor of England for the time being, the names of all persons of the jurisdiction of the said chancellor of Oxford, who are tied in the bond of the greater excommunication, and that our said chancellor for the time being may cause our writs to be made and sealed under our great seal, for the taking of them who shall thus by the said chancellor of Oxford be excommunicated, and shall continue so for forty days (b) upon the significavit*

(a) *Vide Lib. Parl. Ed. 1. 194. Rot. Pat. 9 Ed. 3. Pars 1. m. 10. Pat. 12 Ed. 3. Pars 2. m. 8. Pat. 14 Ed. 1. Pars 1. m. 47. Pat. 21 Ed. 3. Pars 3. m. 22. Pat. 26 Ed. 3. Pars 1. m. 24.*

(b) See 20 H. 6. 25. That within the forty days there might be an appeal to the court of Rome.

or certificate of him the said chancellor of Oxford aforesaid, as in our letters patent thereof made is more fully contained; and John F. chancellor of the university aforesaid, &c. by his letters, &c. that W. of B. &c. of his jurisdiction for his, &c. as in the writ. And *quere* if the university of Cambridge have such privilege; it seemeth they have.

2 H. 4. 3.

If a man be sued in the spiritual court, and he purchase **D** a prohibition and deliver the same, and notwithstanding they proceed, for which cause the defendant sueth an attachment upon the same prohibition, and pendent the attachment the defendant in the spiritual court is excommunicated, and the same certified into the chancery, by reason whereof a *significavit* is awarded unto the sheriff against the defendant to take him: now the defendant may come into the chancery, and shew how that he had a prohibition, and an attachment thereupon against the party, and that pendent the attachment he is excommunicated, and the *significavit* awarded to take him. (c) Now upon that he shall have a *superseas* directed unto the same sheriff, reciting all the matter, commanding him not to take him; and if he do take him for the occasion aforesaid, that he deliver him *donec placitum dicti attachiamenti fuerit discuss'*, &c. And this writ shall issue out of the chancery, (a) if the attachment be not returned into the king's bench. But if the attachment be returned into the king's bench, then he shall have this writ of *superseas* out of the king's bench, or out of the chancery, at his pleasure. And it ought to appear by the certificate of the bishop, that he hath been excommunicated by the space of forty days, before the *significavit* should be awarded.

And if a man be sued in the spiritual court, or the **E** bishop sue or cite him *ex officio*, and excommunicate him,

(c) See the like writ, *Rot. Claus.* 7 H. 3. m. 6. *Quia constat nobis in mandatorio nostro nos fuisse circum-*
ventos.

(a) But yet by *Morris* and *Thorpe*, in the like case, they would not grant a *superseas* out of chancery, while the common pleas, where the attachment is returnable, is open. 38 *Ed.* 3. 14.

and

and certify the same into the chancery, and upon the same a *significavit* is awarded unto the sheriff to apprehend him, &c. and afterwards the official by letters certify into the chancery, that he hath appealed from that sentence unto the court of *Rome*, or unto the court of *Canterbury*, &c. then upon that certificate he shall have a writ of *superfedeas* directed unto the sheriff, reciting that he hath appealed, commanding him not to apprehend him *pending the appeal in the business abovesaid*; or thus, to surcease, until we shall have ordained otherwise from our council, or until such a day; or thus, to surcease, &c. and he hath apprehended him on that occasion, then that he cause him to be delivered out of the prison aforesaid, &c. wherein, &c.

And after the *significavit* awarded against the party, if he bring the Pope's (b) bulls into the chancery, testifying that he hath appealed from that sentence, &c. he shall thereupon have a *superfedeas* unto the sheriff; and in the *superfedeas* it behoveth not to make mention of the Pope's bulls, but to say, *That as by certain publick instruments*, &c. And he ought to prove his diligence in suing his appeal by witnesses, or by oath, and within the year of the time of his appeal sued. And the rule in the Register is, writs of *superfedeas* (*hanging appeals*) ought not to be; if it do not appear upon record in the chancery that the *significavit* is granted and passed, &c.

F And this writ of *significavit* doth not lie but where a man is excommunicated by a special name, and in a special suit against him by the ordinary *ex officio*, or by the party; for that is called *the sentence of the greater excommunication*, and upon certificate thereof in the chancery doth

(b) So that an appeal to *Rome* was sufficient for a *superfedeas*. 20 H. 6. 26. Yet a repeal of an excommen- gement made by judges delegated by the Pope was not sufficient to make one responsible against a certificate of excommunication by the archbishop. 16 Ed. 3. Excom' 4. And Note well 14 H. 4. 14. where on a sentence given at the court of *Rome*, a dele-

gacy was made to the archbishop of *Canterbury*, to execute the excommen- gement, yet the party was still responsible, for that the archbishop did this not as archbishop or judge, but only as an officer, and therefore he cannot absolve him till agreement made with the party. See Rot. Parliament. 8 Ed. 2. m. 7. *Petitio Ab- batis de Rufford*.

the writ lie. But where he is not especially excommunicated, &c. (a) although that the bishop certify that he is excommunicated *in the sentence of excommunication*, upon that this writ of *significavit* doth not lie, for they ought to express the cause, and sue against him specially in the certificate.

Upon an excommungement certified by the Pope's bulls, a *significavit* shall not be granted.

[65]

12 Ed. 4. 15.
16.

14 H. 4. 14.

8 H. 6. 3.

20 H. 6. 1.

7 Ed. 4. 14.

If a bishop certify an excommungement into the chancery, made in time of his predecessor, and the contumacy, &c. he shall have a *significavit* thereupon: but upon the certificate of the commissary (b), or official, of an excommungement in the chancery, and of the contumacy, a *significavit* shall not be granted; nor upon the certificate of an abbot, who hath ordinary jurisdiction, of excommungement in chancery, shall a *significavit* be granted.

Co. Lit. 134. a.
8 Rep. 68. b.
Mo. 775.

If a bishop certify in chancery, that another bishop **A** hath certified him that the party is excommunicate in his diocese, and so hath remained by the space of forty days; the same certificate is void, and a *significavit* shall not be granted thereupon.

(a) *Nota; Excommunicatio aut fertur a jure, & tunc est poena delicti, vel ab homine & tunc est poena contumaciae in non veniendo vel parendo, utraq. autem vel Major quia privata receptione sacramentorum & ab hominum consortio qualis est hodie in usu, and is commonly called at this day, Excommunicatio vel minor quae excludit a praecipuis sacramentis estq; lata vel a lege ut per excommunicationem excommunicato, vel ab homine licet raro. Lib. de Rubric. de Sententia Excom'.*

Note; In certifying an excommungement, the cause must be expressed, and if not sufficient, the party shall have a writ out of chancery to assail him. 14 H. 4. 14. It seems the cause need not be certified, but where

a prohibition is brought against the bishop; but on a general certificate it shall be intended to be for the same cause as is in the prohibition. 28 Ed. 3. 97. a. 22 Ed. 4. 20. a. 20 Ed. 3. Excom. 9. 15 H. 7. 16. See 3 H. 4. 3. b.

(b) See 11 H. 4. 64. a. by Hankf. at the ancient common law, a commissary might certify excommunication; but he was restrained by parliament.

And note the cause why none inferior to a bishop can invoke the aid of the temporal arm, *Lindw. de Sentent' Excom' cap' Praeterea, &c.* See 11 H. 4. 64. 7 Ed. 4. 14. but otherwise of committing of administrations or probate of wills.

If

B If a man be excommunicated in the spiritual court, and the bishop certify the same in the chancery, and have a writ of *significavit* directed unto the sheriff to apprehend the party, and the defendant do appeal unto the court of *Rome*, and have bulls and instruments exhibited into the chancery to prove the same; then upon these bulls, &c. shewed in chancery, he shall have a special *scire facias*, rehearsing all the matter, directed unto the sheriff, to warn the party at whose suit he was excommunicated to appear in the chancery at a certain day, to shew cause why he ought not to surcease to apprehend the party so excommunicated depending the same appeal; and also commanding the sheriff to take sufficient sureties, who will answer body for body, for him who is so excommunicated, to pursue, &c. and to do unto the party as the court shall award, and that then he do surcease to apprehend him. And if the sheriff return the writ of *scire facias*, that he hath warned the party, and hath sent that writ unto the bailiff of the liberty, who had given him answer, that he had warned the party at whose suit he was so excommunicated, to appear in the chancery at the day given by the writ, &c. Now if the party who was returned warned do not come to appear, then he who was excommunicated shall have another writ unto the sheriff to deliver him, &c. if he hath apprehended him; and if he hath not taken him, that he do surcease to apprehend him, &c.

C And if a man be excommunicated by the bishop, and after the vicar-general certify the same into the chancery, because the bishop is *in remotis*, for which a *significavit* is granted, and he is taken by it; and then he who is apprehended, by his friends shew in the chancery how that he hath appealed unto the court of *Canterbury*, which he followeth with effect: upon this surmise he shall have a writ unto the sheriff, who hath the party excommunge in his custody, commanding him that he warn the bishop or the vicar-general, and him who sued the process against the party excommunge to appear in a certain day in the chancery, to shew wherefore the party should not (*pending the appeal*) be deli-

delivered; and also to cause the party excommenge under safe custody to come, and to do as the court shall consider in the said cause.

If the bishop do excommunicate a man, and certify D the same into the chancery, and thereupon a *significavit* be awarded, and the party taken thereby, and he sue appeal in the court of *Canterbury*, or of *Rome*, &c. and have a *scire facias* against the bishop as aforesaid, and against the party, to answer in chancery, and shew cause why he should not be delivered; by which the bishop and the party are warned, and appear not, for which cause the party is delivered: now if he who is excommunicated will sue any action in the common pleas, or in the king's bench, or elsewhere, if he think the other party will plead the excommunication against him in the common pleas, or elsewhere, then he shall have a special writ of *significavit* unto the justices of the court where he sueth, rehearsing all the matter as aforesaid, &c. commanding them to proceed *according to the law and custom of the realm*.

If the bishop certify into the chancery an excommu- E nication made at the suit of any one, and thereupon a *significavit* be awarded, and the party apprehended; now he who is apprehended may by his friends shew in the chancery, that he sued an appeal from that sentence in the court of *Canterbury* with effect, and by *scire facias* against the bishop, and the party at whose suit he was excommunicated, returned at a certain day into the chancery: and thereupon he shall have a writ unto the sheriff, rehearsing all the matter, commanding him thereby to warn the bishop and the party to be in the chancery at the day of the return of the writ, to shew what they can say, wherefore the party should not be delivered; and also by the same writ commanding the sheriff, that he take sufficient sureties of the party excommunicated to appear in the chancery at the same day, and to carry him back again unto prison, if the court at the same day should so think fit; and in the mean time to let him go at large by his sureties, &c. and then if at the day of the return of the writ the party excommunicated do not appear,

pear, nor his bail, then shall a new writ be awarded unto the sheriff to apprehend the party excommunicated again, &c. until satisfaction shall be made by him to holy church, as well for the contempt as the wrong; and also to arrest the bail to appear before the king in his bench at a certain day, &c. as well to satisfy us as the aforesaid bishop, and him at whose suit he was excommunicated; and farther to do as the court shall award. And if at the day given in chancery by the writ of *scire facias* the bishop, and the party at whose suit he was excommunicated, do appear, and also he who was excommunicated, and the matter cannot be determined that day; then day shall be given over unto both parties, at a certain day at another term, &c. and then the party excommunicate shall have a special *supersedeas* unto the sheriff, rehearsing the whole matter, commanding him that he do not apprehend him till that day, &c. if he have not other commandment from the king, &c.

A There are other writs in the register, which are called writs of *significavit*, because they shall not be granted before that the bishop hath made certificate by his letters under his seal of the matter in the chancery, upon the which the writs shall be so granted. And the writ is, where a man is a clerk convict of felony, and afterwards makes his purgation; now the bishop shall certify this purgation into the chancery by his letters, &c. and thereupon the clerk convict shall have a special writ out of the chancery, directed unto the sheriff, to restore him to his goods and chattels.

[66]

The king to the sheriff of Lincolnshire, greeting: Whereas C. of P. parson of the church of R. lately charged before our trusty and well beloved W. and his companions our justices with ravishment of the wife of S. and carrying away his goods, being delivered to the bishop, as the manner is, hath there lawfully purged his innocency touching the same crime before the said ordinary, as the same bishop hath signified to us by his letters patent; We of our special grace command you, that without delay you restore to the same C. his lands, goods and chattels by you taken into our hand, by occasion of the premisses, unless he fled upon that occasion, witness, &c.

And the like writ for the heir of the clerk after his death, to deliver the lands unto him, &c. and in the writ are these words, *without delay of our special grace*, by which it seemeth that these words, *of our special grace*, are not necessary words, but words of form for the king's honour, and that the king of right ought to make such restitution.

Clergy Vide
4 Ed. Dyer
215.
Stamf. 108.

And if a man do demand his clergy before the justices, and read as a clerk, and the ordinary be demanded, and come not, for which the justices command the clerk to gaol again, &c. now at the suit of the ordinary, or of his vicar-general, unto the king, or his chancellor, he shall have a writ out of the chancery directed to the justices of gaol-delivery reciting the matter, commanding them that they send unto the gaoler to deliver him unto the ordinary.

B

Sanctuary.

And if a man be taken out of a church, or out of sanctuary against his will: now if the bishop certify the matter by his letters patent under his seal into the chancery, &c. desiring restitution; then the king shall send his writ unto the justices of goal-delivery, reciting the matter, commanding them to bring back the party to the place from whence he was taken.

C

If an abbot or prior certify by his letters under his seal, that his monk, friar, canon, is vagrant out of his order, &c. in the country; then upon that certificate he shall have a writ unto the sheriff, to arrest and apprehend him, and to deliver him unto his abbot or prior, &c. or to their attorney, to chastise him according to the rule of his order, &c.

D

Writ de Homine replegiando.

Stamf. 71.

IN divers cases a man shall not have this writ, although he be taken and detained in prison: as if a man be apprehended for the death of a man, or be taken by the king's com-

E

command; (a) or if a man be apprehended by the command of the chief justice, as it appeareth by the Register. But the statute of *West. 1.* is that he shall not be replevitable, if he be taken by the command of the justices, and do not say of the chief justice.

*West. 1. c. 5.
2 Hawk. P. C.
151. 6th edit.*

And also if a man be taken by the command of the justices of the forest, or if a man be outlawed, or if a man abjure the realm, or if a man be approver, or if a man be taken for felony with the manner; or those who break the king's prison, or those who are common or known thieves, or those who are appealed by approver so long as the approvers live, if they be not of good fame, or for burning of houses feloniously, or those who counterfeit the king's money, or the king's seal, or those who are taken by certificate of the bishop by a writ *de excommunicato capiendo*, or those who are apprehended for treason, or those who are convicted by a writ of *redisseisin*, &c. all these persons are notailable by this common writ *de homine replegiando*. But first they ought to make their fines, or agree with the king, and thereupon to have a special writ to the justices, or those who do keep them in prison, reciting how they have been fined, commanding them to deliver them.

Post. 189.

F (b) And if two or three men be taken and imprisoned they may sue a joint writ *de homine replegiando*. And yet *H. 8 H. 4. 31.* such a writ sued by two was abated; but yet it seems the law is, they may sue jointly, and the writ shall be such:

*8 H. 4. 21. but
8 H. 4. 16.
contra
See 78. D. &
9 H. 4. 2.*

The king to the sheriff of Lincolnshire, &c. We command you, that justly and without delay you cause to be replevied B. C. and D. whom you yourself have taken, and taken keep, as it is said; or, whom D. and E. have taken, and taken keep, as it is said, unless they were taken by the special command of us, or of our chief justice, or for the death of man, or for our forest, or for any other right for which they may not be replevi-

(a) See *14 H. 6. 8.* A diversity where one is imprisoned on a suggestion without writ, as by justices of peace, magistrate of a town, or lord of a vill or manor, on the statute of Labourers, &c. there may be dif-

charged by them without any writ from the king; but it is otherwise if they are imprisoned by writ.

(b) See accordant *8 Ed. 4. 16. a.
12 Ed. 4. 4. con. 8 H. 4. 21. b.*

ed according to the custom of England, that we may hear no more clamour thereupon for want of justice. Witness, &c.

And upon that he shall have an *alias* and *pluries*, and attachment, if need be. But if he who apprehendeth the man do claim him as his villain, and the same be returned by the sheriff upon the *alias* or the *pluries*, then the plaintiff shall have another writ of *pluries* to the sheriff, thus :

[67]

The king to the sheriff, &c. Whereas we have oftentimes commanded you, that justly, &c. W. whom H. took, and taken, keeps, as it is said, unless he was taken, &c. and be not repleviable, or that you should signify to us the cause wherefore, &c. and you have returned to us, that you went to the manor of the aforesaid H. there to replevy the aforesaid W. according to the tenor of our command aforesaid ; but the aforesaid H. would not permit delivery of the body of him the said W. to be made, because he asserted that the said W. was his villain and fugitive of his manor aforesaid, by claiming right of villainage and servitude in the person of him the said W. within the dominion of his manor, &c. we being unwilling that the aforesaid W. if he be a freeman, should be destitute of the common law by such taking and claim, command you, that if the aforesaid W. find you sufficient caution, &c. to be before us from the day of Saint Michael in fifteen days, &c. to answer the aforesaid H. if, &c. then cause him the said W. in the mean time to be replevied according to the tenor of our commands, &c. And nevertheless, if the aforesaid W. make you secure touching his claim, &c. then put by gages, &c. the aforesaid H. that he be before us on the aforesaid day to answer the aforesaid W. of the taking and claim aforesaid : and have you there the names of the pledges and this writ, &c.

11 H. 4. 25.

And in the same manner it shall be done in a *homine replegiando* : If the defendant claim the plaintiff as his ward, then upon that returned at the *pluries* by the sheriff, the plaintiff shall have a special writ as aforesaid, reciting that he holdeth the same land of the defendant by socage, and not by knights service ; commanding the sheriff to deliver him, and to admit the defendant by pledges to appear at a certain day, as afore is said, to answer unto the plaintiff, &c.

And

A And if a man be taken within the cinque ports, then he shall have a writ *de homine replegiando*, directed unto the constable of *Dover*, and unto the warden of the cinque ports, or his lieutenant, in the nature of an *audita querela* and the writ shall be,

The king to his beloved, &c. constable of his castle of Dover, &c. and to the warden of his cinque ports, or his lieutenant, greeting : we command you, that having heard the complaint of A. whom B. took, and taken detaineth within the liberty of the ports aforesaid, as it is said, and having called before you the parties aforesaid, and having heard their reasons on each side, you cause him the said A. to be replevied, if he be replevisable according to the law and custom of the ports aforesaid unless he be taken by the special command of us or of our chief justice, &c. that we may hear no more clamour thereof for want of justice, &c.

And if a man be taken by the officers of the forest, then he shall have a writ *de homine replegiando* unto the keeper of the forest, in such form, viz.

The king to his beloved and faithful W. of B. keeper of his forest on this side Trent, or his lieutenant in the forest of S. we command you that if A. and B. taken and detained in the forest of S. for trespasss of venison by them done, as it is said, whereof they are indicted, shall (to wit) each of them find you twelve honest and lawful men of your bailiwick, who shall be mainprize, to have them before our justices (a) next in eyre at the pleas of the forest in the county of N. when they shall come into those parts, to stand to the right touching the trespasss aforesaid; then in the mean time that you deliver them the aforesaid A. and B. in bail to the aforesaid twelve men, as is before said, if according to the assise of the forest they shall be replevisable : and have you there the names of those twelve men and this writ. Witness, &c.

B And if the warden will not bail him, he shall have an *alias* and *pluries* against the warden, directed unto the sheriff, to attach him to answer before the king in his bench, and to shew wherefore he has not replevied him, &c. and in the same writ it shall be contained, that he call to

(a) See *int' roll' ordinationem anno 5 Ed. 2.* of indictments of the forrest.

1 Ed. 3. c. 8.
7 R. 2. c. 4.
Carth. 77, 78.

him the verderors, to deliver him who is so taken in the presence of the verderors by good bail, and that the sheriff do deliver the names of the bail unto the same verderors, to answer before the justices in the next eyre. And no man shall be taken or imprisoned for vert or venison, if he be not found in the manner, or indicted; in which case he shall be set to bail by the warden *ex officio*, otherwise by writ, as is aforesaid, &c.

C

For hunting in the king's chases, or in the chases of other men, he ought to be sued at the common law; and for the same a man shall not be taken and imprisoned, until he be convicted at the common law in an action there brought against him. But for hunting in parks, &c. the party shall have an action within the year and day upon the statute of *West. 1. cap. 20.* But after the year and day the king shall have a suit.

D

Replevin of a
park.

And if a man hath any park within the bounds of any forest, which park is not inclosed according unto the assise of the forest, &c. then it shall be seized into the king's hands; and then the party shall have a special writ of replevin, to replevy a park out of the king's hands: and the writ is such;

E

The king to his beloved and faithful W. of B. keeper, &c. or to his lieutenant in the forest of S. greeting: We command you that you cause to be replevied the park of A. of B. and J. to the same A. until the coming of the justices of the pleas of the forest in the county aforesaid which is within the boundaries of our forest aforesaid, and which is seized into our hand, because it is not inclosed according to the assise of the forest, as it is said, if it be replevisable according to the assise of the forest. Witness, &c.

5 H. 7. 3. 13 H.
7. 17. but the
better opinion is,
that it is in the
judge's discretion.
But 6 Ed. 4. 8.
and 12 Ed. 4. 4.
that he shall
not find surety.

In a *homine replegiando* the defendant claims the plaintiff for his villain, and the plaintiff pleads that he is free, and saith that the defendant hath taken his goods, and prays that he may gage deliverance, &c. for which the defendant doth gage deliverance. But the plaintiff shall not find sureties that he shall re-deliver the goods, &c. if he be found villain. *Quod vide M. 6 Ed. 4. 8.*

F

But in a *homine replegiando*, if the defendant claim the plaintiff as his villain, the plaintiff ought to find sureties

G

Writ de Homine replegiando.

to deliver his body to the defendant, if he be found his villain. *Quod vide P. 31 Ed. 3.*

A In a *homine repleg'* the plaintiff was bound in a recognizance in a certain sum of money unto the defendant's use, that he would sue him *cum effectu*; and if the writ be abated for any cause, yet he ought to sue another writ for that taking, &c. otherwise he shall forfeit that recognizance, as it appeareth. *H. 8 H. 4.* [68]

B If a man sue a *homine repleg'*, and the defendant claim the plaintiff for his villain, if the sheriff return the same upon the *alias*, or upon the *pluries*, in the king's bench or common pleas, where the writ is returnable; then upon surties found in court where the writ is returned by the plaintiff to yield his body, &c. he shall have a special writ unto the sheriff to deliver the plaintiff out of prison, &c. But by the register he shall have a special writ unto the sheriff to take sureties of the plaintiff, and to sue with effect, and to yield his body, if, &c. But the usage at this day is, that he find sureties in court, &c. and not to award a writ unto the sheriff to take sureties. *Quod vide M. 8 H. 4. 3.*

C And in a *homine repleg'*, if the sheriff return that the defendant hath esloined the plaintiff's body, so that he cannot deliver him; then the plaintiff shall have a *capias in withernam* to take the defendant's body, and to keep the same *quousque*, &c. (a) whether he be a peer of the realm, or other common person. And if the sheriff return *non est inventus* in this *capias in withernam* of the body, then the plaintiff shall have a *capias in withernam* against the defendant's goods, &c. *Quod vide M. 11 H. 4. in title of Withernam.* Fortesc. Pref. to his Rep. fo. 18.
11 H. 6. 15. b.

(a) A *capias* lies against a peeress made by the baron. 1 H. 5. 14. a. of the realm on a rescous, returned

(b) *Writ de replegiare de Averiis.*

IF a man take more live cattle than one beast, then D the writ is such :

Plow. 223. a.

The king, &c. We command you, that justly and without delay you cause to be replevied (a) the cattle of B. which D.

(b) *Note* ; A replevin is viscontiel by reason of this clause, *et postea eam inde juste deduci fac'*. But by the *pluries*, without question the sheriff's power to proceed in the county court is determined ; as was clearly held by all. If the sheriff does not execute the writ, but returns *elongata*, it was doubted if the sheriff shall execute the writ, by reason the words (*vel ipse sit*) are conditionals. 2 H. 7. 5.

Note ; on the *pluries* the parties have no day in court, but only the sheriff ; yet he may return pledges on the *pluries*, or on the replevin if it be found ; and yet the plaintiff may come at the return of the *pluries*, and take issue on the cause returned by the sheriff, so as to intitle himself to damages against the sheriff, and the king to a fine for his contempt. But if at the return of the *pluries*, the plaintiff, and also the defendant appear, they may plead, &c. and also (by *Ashton*) if the defendant appears, he may compel the plaintiff to count (*instante*) although they have no day in court, and by the same reason may cause the plaintiff to be called upon a non-suit. See 22 H. 6. 21. *Bromfleet's Case*. 2 H. 7. 5. But the defendant without doubt is not compellable to come in at the day of the *pluries*, but if he does, he may plead with the plaintiff, and the plaintiff may find pledges in court instantly. See R. Entr. 560. b. where the plaintiff at the day of the return of the *pluries* (if the writ be executed) may have an attachment against the de-

fendant *ad respond' de placito quare cepit averia, &c.* R. Entr. 570. or if the sheriff returns *elongata*, then the plaintiff shall have a *withernam* wherein is also contained an attachment against the defendant ; and by the *withernam* day is given to both parties, so that if the *withernam* be returned *tarde*, then the defendant at the day may compel the plaintiff to count ; but otherwise it is, if the *withernam* be not returned served, because then the parties have no day in court but by the roll, and therefore the plaintiff cannot be non-suit, but may count. 22 H. 9. 22. by *Newton*.

A non-suit was in replevy, where the plaintiff did not find pledges ; but if the plaintiff has found pledges and the sheriff on the attachment in the *withernam* returns that the defendant *nihil*, yet it seems he may come in by a day on the roll, and the plaintiff shall be called ; and if he be non-suited, a special writ of delivery on the *withernam* shall be granted to the defendant, and a return of the beasts ; notwithstanding the return of the sheriff, if in truth the sheriff had made deliverance of them to the plaintiff or not, and so force the plaintiff to a *second deliverance*. Dyer 189. *Quare* if the writ of second deliverance be not taken away by a late statute.

(a) And he may count of several takings, part at one day and place, and part at another day and place. 29 Ed. 3. 23. adjudged.

took

took and unjustly detains, as it is said, and afterwards thereupon cause him justly to be removed, that we may hear no more clamour thereupon for want of justice, &c.

But if he take but one live beast, then the writ shall be,

The king, &c. We command you, that you cause to be replevied to B. his certain horse, or his certain labouring beast, or his ox, &c. (b).

And if a man take a dead chattel, then the writ shall be, Dyer 229. 2.

The king, &c. We command you, &c. that you cause to be replevied to B. his goods and chattels. And in the count he ought to declare of divers things: but if he take but one thing which is a dead chattel, then the writ shall be,

E The king, &c. We command you, &c. that you cause to be replevied to B. a certain net, or a certain swarm of his bees, or a certain iron of his mill. And if the sheriff doth nothing upon this writ, then he shall have an alias repleg' fac', &c. and in the same writ he may have this clause; or signify to us the cause you would not or could not execute our command heretofore directed to you thereupon, &c. And then this writ shall be returned into the (c) king's bench or common pleas. And if he do not serve this writ, then he shall have a pluries returnable into the king's bench or into the common pleas, and in the pluries is alway this clause; vel causam nobis significes: but not in the alias repleg', if not that the party will have it put in the writ. And the plaintiff may sue all these writs forth together, viz. the replevin, the alias and the pluries, and deliver them unto the sheriff all at one time, if he so see good. And if the sheriff do not return the pluries, then the plaintiff may have an

(b) So it may be of a horse, &c. and if the sheriff make deliverance of a horse to the defendant, he shall not have trespass, because he might have claimed property; but of a stranger's horse not party to the writ, he may have trespass against the sheriff. 14 H. 4. 24. 21 Ed. 4. 16 & 54. And

quære, whether trespass lies against the sheriff for replevying a stranger's beast, by the plaintiff's own shewing or direction. Kelw. 119. per Jod.

(c) See Dyer 189. a return in chancery, and note by the pluries the power of the sheriff is determined. 11 H. 4. 49.

attachment against the sheriff (*d*) directed unto the coroners.

And it appeareth by the Register, that if the sheriff F return upon the *replevin*, *sicut alias* or *pluries*, that he hath sent unto the bailiff of the franchise, &c. who hath given him no answer, or that he will not make deliverance, &c. then the plaintiff shall have a *non omittas* unto the sheriff, that he enter into the franchise and make return; and if the sheriff do not, he shall have an *alias non omittas* directed unto the sheriff, and afterwards a *pluries non omitt'*, &c. But it seemeth that that return, *That I commanded the bailiff of the liberty, &c. who gave me no answer*, or the return, that the bailiff will not make deliverance of the cattle, are not good returns. For by the statute of *West. 1. cap. 17.* in the end of the statute it appeareth, that the sheriff upon such a return made to him by his bailiff, ought presently to enter into the franchise, and to make deliverance of the cattle taken: and so it appeareth the sheriff may do by the statute of *Marlebridge, cap. 21.* If a plea of *withernam* be in the county by plaint before the sheriff, and the sheriff send unto the bailiff of the liberty to make deliverance, and the bailiff do nothing, that then the sheriff *ex officio* may enter into the liberty without any writ directed unto him in that case.

(*a*) And if the sheriff upon the *pluries* return, *that the* G
aforesaid B. took the cattle of the aforesaid A. and hath driven
them

(*d*) See 44 *Aff. 15.* an attachment against the sheriff to have a *replevin* directed to the coroners, and the sheriff returns the attachment & *elongata* for the beasts; whereupon a *distringas* against the sheriff, with a *withernam*, issued, and he returns the *distringas* with a taking in *withernam*; and now comes the plaintiff, and prays a writ of deliverance of the beasts taken in *withernam*; and the defendant comes and prays, that the plaintiff may gage deliverance of them, for that part of the beasts so

taken were dead in pound, &c. and the residue he is ready to deliver; and because he had not part (ready) at the day in court, the plaintiff was directed to sue a writ to the coroners to deliver the first beasts, and to attach the defendant to answer, and on the return thereof the plaintiff might plead, &c.

(*a*) If the sheriff return that the beasts are inclosed in a park among savages, or inclosed in a castle, &c. he shall be amerced, and another writ of *replevin* shall be awarded; for he
ought

them out of the county aforesaid into the county of T. wherefore he could not replevy them to the said A. &c. or if the sheriff return, that he sent to the bailiff of the liberty of D. who hath return of writs, &c. who gave him answer, that the cattle are esloined into divers liberties, by reason whereof he cannot have a view of them, nor deliver the cattle; or if the sheriff return, that he himself cannot have view of the cattle to deliver them; or if he return, that after the taking, &c. that the defendant hath esloined the cattle out of his bailiwick that he cannot deliver them; or if he return, that the defendant hath esloined them into unknown places, that he cannot have view of them to deliver them; or if the sheriff return, that he sent unto the bailiff of the liberty, who answered him, that the defendant had impounded the cattle within the rectory of the church of G. for which cause he cannot deliver them, &c. Upon these returns made by the sheriff, the plaintiff shall have a writ of *withernam* to take as many of the defendant's cattle, directed unto the sheriff; and the writ shall be such:

[69]

A The king to the sheriff, &c. Whereas we have oftentimes commanded you, that justly, &c. to A. his cattle, which B. &c. detains, as it is said, or should signify to us the cause why you would not or could not execute our command more than once directed to you thereupon; and you have signified to us, that after the aforesaid B. took the cattle of the aforesaid A. he drove the same through your county, and from the county aforesaid into the county of C. wherefore you could not replevy them to the said A. We being willing to counteract the malice of him the said B. in this matter, do command you, that without delay you take in *withernam* the cattle of the aforesaid

Withernam.

ought to have taken the *posse comitat'*. 8 H. 4. 18. for it was a denial.

On a *pluries* to the sheriffs of London, they return the custom of the city, that replevin ought to be made in the sheriff's court there, and not by the king's writ; & *non allocatur*, and an attachment was granted. Dyer 254.

See a replevin against him who distrained for the king for fifteen shillings, 20 Ed. 3. *Avowry* 130. 19 Ed. 2. *Avowry* 223. and note on an excessive distress the plaintiff may recover damage there. 11 R. 2. *Avowry* 87.

Q 4

B.

B. in your bailiwick, and detain them until you can, according to the custom of our realm, replevy to the said A. his cattle aforesaid, according to the tenor of our said commands heretofore directed to you, &c.

And note, that in the writ of *withernam* the cause B which the sheriff returned upon the *pluries*, &c. ought to be put and rehearsed in the writ of *withernam*, as before is said. And if the sheriff return upon the *pluries*, that he hath sent unto the bailiff of the liberty, and that he answers him, that the beasts are esloined, &c. then he shall have a *withernam* directed unto the sheriff, and the sheriff shall send his bailiff into the liberty to sue the *withernam*; and if the bailiff do not execution, nor give answer unto the sheriff of the precept directed unto him, then the plaintiff shall have a *withernam* directed unto the sheriff, with *non omittas because of any liberty*, &c. but enter the same, &c. and to take the cattle in *withernam*, &c.

(a) And it appeareth by the Register, if a man sue a C replevin in the county without writ, and the bailiff return unto the sheriff, that he cannot have view of the cattle to deliver them; then the sheriff by inquest of office ought to inquire thereof: and if it be found by the jury, that the cattle are esloined, &c. then the sheriff in the county court may award a *withernam* to take the defendant's cattle. And if the sheriff will not award a *withernam*, then the plaintiff shall have a writ out of the chancery directed unto the sheriff, rehearsing the whole matter, commanding him to award a *withernam*, &c. And he may have an *alias*, and after a *pluries* and attachment against the sheriff, if he will not execute the king's command, &c.

(b) And a man shall have a replevin of divers cattle D that are taken; as if a man take divers cows or sheep,

(a) See 30 Ed. 3. 23. By the usage of the city of Northampton, the frankpledge of the vill may make deliverance in the absence of the bailiff.

(b) Where on the issue, that he did not take, and the special matter found, it shall be adjudged for the plaintiff. 18 Ed. 3. 43. See 12 Ed. 4. 5.

and afterwards they have calves or lambs, the plaintiff shall have his replevin of them all, as well as of the cows and sheep which were taken.

E And the sheriff, upon a complaint made unto him of taking the cattle, may command his bailiff by word to replevy them (c); and the same is as well as if the sheriff had made his warrant to his bailiff to have replevied them; for it may be that the sheriff nor his bailiff cannot write, or that they may want such things wherewith they may write a warrant, &c.

77. C. infra.
V. 16 H. 7. 14.
that a precept to
the bailiff by
word is as good
as by writing.

F And the lord shall have a replevin, if his villain's cattle are taken; and yet he had not property in them at the time of the taking, but now by his claim he hath, &c. But it seemeth he shall not have damages for the taking of the cattle, but only for the detaining of them, if the same be found for him. 9 H. 6. 26. 42 Ed. 3. 28 or 8.

1 Inst. 145. b.
33 Ed. 3.
Replevin 43.
9 H. 7. 22.
14 H. 4. 4.

G (a) And if a man take cattle for damage-feasant, and the other tender amends, and he refuse it, &c. now if he sue a replevin for the cattle, he shall recover damages only for the detaining of them, and not for the taking of them, for that the same was lawful, and therefore no re-

(c) He may command his bailiff on a plaint made to him, and this is by the statute of *Marlebr. c. 21.* and there the sheriff himself is judge. 28 H. 6. *Retorn' de Vic'*. 17 Dyer 245. But if the party (defendant) claims property, the sheriff cannot in that case make replevin.

See a replevin against executors of goods taken by the testator, 14 H. 4. 29. 33 Ed. 3. *Avowry* 257. See a replevin of beasts, *Domus & ecclesie capt' tempore prædecessoris*, 9 H. 6. 25.

(a) See 27 Ed. 3. 8. b. 45 Ed. 3. 9. But if the other had them in pound before amends tendred, it is then too late to tender the amends, and on the avowry the defendant shall have no return till a new tender, and then the party may have

detinue. *Quære* 13 H. 4. 17. 14 H. 4. 4. And if he tenders before the taking, the taking is tortious, 7 Ed. 3. 8. and if immediately on the taking, the detainer is so, and he may recover damages for it, and no return shall be awarded to the lord. 45 Ed. 3. 9.

If the tenant tenders his fealty, and yet the lord distrains and avows for it, the tenant cannot plead the tender, without saying he is still ready to perform it, and he ought to make the fealty in court. See 3 Ed. 2. *Avowry* 187. If the tenant tenders his homage, and the lord refuse, he cannot afterwards distrain for it, without a new demand and refusal. 20 Ed. 3. *Avowry* 123.

turn shall be. See 22 *H.* 7. 30. *contra* in case of trespass.

And if the lord distrain his tenant's cattle wrongfully, H and afterwards the cattle return back unto the tenant; yet the tenant shall have a replevin against the lord for those cattle, and shall recover damages for the wrongful distraining of them, because he cannot have an action of trespass against his lord for that distress: but against a bailiff or servant he may. 1 *H.* 6. 7.

(b) And if a man do distrain cattle in one county, I and drive the cattle into another county, the party may sue a replevin in which of the counties he will, but not in both the counties. See 19 *H.* 6. 34, &c.

And if the cattle of a feme sole be taken, and afterwards she marry a husband, the husband alone may have K a replevin. *Quod vide Trin.* 33 *Ed.* 3. See 33 *Ed.* 3. pl. 43. *Bro. Bar. & Fem.* 85. *contr.*

(c) And in a replevin, if the plaintiff do declare, that L the defendant yet hath and detaineth the cattle, and the defendant appear, and afterwards make default; the plaintiff shall have judgment to recover all in damages, as well the value of the cattle, as damages for the taking of them, and his costs. *M.* 8 *H.* 8. *Rot.* 108. See *Lutw.* 1150.

(b) See where replevin does not lie in this case, but he is put to his writ on the statute, and therefore the writ to the sheriff of the county where the beasts were taken was abated. *Temp. Ed.* 1. *Avowry* 194. *Dyer* 169. *Post.* 84. P. See 19 *H.* 6. 34. 21 *H.* 6. —. 11 *H.* 4. 10. 42 *Ed.* 3.

(c) So if the defendant claims property, or says that he did not take, &c. If in the mean time the beasts die, or are sold, so that he cannot

have a return, he may recover all in damages, if it be found for him. 7 *H.* 4. 18. the defendant claimed property in *C. B.* and they are at issue, and it was found for the plaintiff, it seems he shall recover the value of the thing taken, and his damages. 11 *H.* 4. 10. If the defendant makes confession and avows, and after day given over makes default, the plaintiff shall recover his damages by taxation of the court. 14 *H.* 4. 2.

Writ de Pone de remover le Plea.

See the Record
hereof Co.
Entr. 610, 611.

M **N**OTE, That if a replevin be sued by writ out of the chancery, then if the plaintiff or defendant will remove that plaint out of the county into the common pleas or king's bench, he ought to sue a writ out of the chancery, which is called a *pone*; and the writ shall be such:

The king to the sheriff of Lincoln. At the petition of the plaintiff put before our justices at Westminster such a day, the plea which is in your county by our writ between A. and B. of the cattle of him the said A. taken and unjustly detained, as it is said, and summon by good summoners the aforesaid B. that he be then there to answer the aforesaid A. thereupon: and have you there the summoners, and this writ.

And if the writ of *pone* shall be removed into the king's bench, then the writ is such:

The king, &c. At the petition of the plaintiff put before us, wheresoever we shall then be in England, the plea, &c.

(a) And this writ is sued for the plaintiff without putting any cause in the writ of the removal, &c.

(a) *Pone* (at the defendant's suit) *loquelam quæ est in com' tuo' int' A. & B. de averiis ipsius A. capt', &c.* and says *præfat' B.* where it should be *præfat' A.* Rolph came for *A.* the plaintiff in the replevin, and prayed damages, because otherwise he had no remedy; for the *pone* is abateable, and so held the court, being without warrant; and yet it shall not be remanded because both are the king's courts, and a new *pone* does not lie in this case, because the plaint shall stand. *Martyn, Baker and Paston contra*, That a *pone* or *recordari* is only to remove the plaint, so that when the plaint is removed, the *pone* or *recordari* is determined, and the court shall hold plea on the plaint, and not on the writ of *recordari*, so

that the pledges first found still remain, and the *pone* or *recordari* shall never abate: and for that the court in this case is seised of the plaint, but the plaintiff has no day; the court shall make a special writ to the sheriff, to warn the plaintiff to pursue his plaint. *Et sic factum fuit*, 3 H. 6. 2. A plaint is well removed, although the *pone* bears date before the plaint entered. 1 R. 3. 4. So if the plaint be removed by *certiorari*, where it ought to be by *pone* or *recordari*. See 7 Ed. 4. 23. So if one plaint is removed where another ought to have been, *ibid.* or where there is a variance between the plaint and the writ. 6 Ed. 3. 55. 8 Ed. 3. 71. See 13 Ed. 1. *Admeasurement* 17.

But

But if the defendant will remove the plea in the county A upon a replevin sued by writ, then he ought to put an evident cause in (b) the writ after the *teste* of the writ; and the form of the writ is such:

The king to the sheriff, &c. Put before our justices at Westminster such a day, the plea which is in your county by our writ between A. and B. of the cattle of him the said A. taken and unjustly detained, as it is said, and tell the aforesaid A. that he may be there if he will, to prosecute his plea thereupon against the aforesaid B. And have you there this writ and the other writ: Witness, &c. And because the aforesaid B. took the cattle aforesaid within his fee for customs and services due to him, as it is said, if the cause be true, and the aforesaid B. require it, let execution of this writ be done, otherwise, not. And he (a) may shew divers other causes: because the aforesaid B. and C. took the catt'e aforesaid in the fee of him the said B. for customs, &c. let execution be done, &c. as above. Or thus: Because A. the clerk of D. sheriff of the county aforesaid, who frequently in the absence of the sheriff of the county holds the pleas of the same county, is the kinsman of the aforesaid A. for which the same sheriff favours him the said A. in the plea aforesaid, as it is said, let execution be done, &c. as above.

Post. 119.

And he may shew any cause which induceth any favour that the sheriff doth or is like to do unto the plaintiff. Or thus: *Because the aforesaid B. claims the aforesaid A. to be his villain, and for that reason asserts the cattle aforesaid to be his own, for which that plea ought not to be brought in the county, as it is said, let execution be done, &c. as above.*

The same holds
in the writ of
recordari.
Infra 70. B.

And if a replevin be sued by writ in any other lord's court than in the king's court, then the plaint cannot be removed before the justices by the plaintiff, nor by the

(b) But the cause may be traversable, for that both are the king's courts. *Vide* the note *supra* & *post*. 119. G.

(a) Per *Rolph*, the sheriff cannot return that the cause is not true,

7 H. 6. 32. and notwithstanding the said causes, the defendant may avow for damage-tenant. 10 Ed. 2. *Avowry* 213. 515. 20 Ed. 3. *Avowry* 130.

defendant, without putting cause in the writ; and the writ is, *At the petition of the plaintiff put the plea which is in your county by our writ between R. and the abbot of W. and I. of a certain horse of him the said R. taken and unjustly detained, as it is said; and summon by good summoners the aforesaid abbot and I. that they be then there to answer the aforesaid R. thereupon: and have you there this writ and the other writ: Witness, &c. Because the aforesaid abbot is lord of the court in C. wherein that plea dependeth by return of our writ, by which the same R. cannot obtain justice in the plea aforesaid in the same court against the aforesaid abbot and I. as it is said.*

And if the plea be removed at the suit of the plaintiff, then when he hath shewed cause in the end of the writ, he shall say afterwards in the same writ, *By reason whereof the same complainant cannot obtain justice in his plea aforesaid against the aforesaid B. in the same court, as it is said.*

And if the plea be removed at the suit of the defendant, then after cause shewed in the writ it shall be said, *For which the same bailiff favours him the said A. in his plea aforesaid, as it is said. Let execution be done, &c. as above (b).*

(b) See 21 H. 6. 50. If the plaintiff be removed by the defendant by *pone*, at the day in bank the plaintiff shall be called on a nonsuit; and if he make default, a return shall be awarded and no process; but if the plaintiff appears, and the defendant makes default, a *distringas* shall issue, and after that process of outlawry. But if the plaintiff be removed by *pone* or *recordari* by the plaintiff, there if he makes default, it is a nonsuit if the defendant *Pon' per Vad'*, and thereon issues a *distringas*, &c. and so process of outlawry.

Writ de Recordari *.

6 H. 4. 1.
6 Ed. 6.
Plow. 74.
It appeareth by
the Register
6 & 7. Br.
Cause de remover
Plea 36. that by
recordari pleas
shall be removed
extra Durban &
Cesiriam: yet
these are courts
of record.

WHEN the plaint is in the county, and the re- B
plevin sued there without writ †; then if the
plaintiff or defendant will remove that plaint, he ought
to sue a writ of *recordari* out of the chancery directed unto
the sheriff; and the writ shall be such:

(a) *The king to the sheriff of Lincolnshire, greeting: We command you, that in your full county you cause to be recorded the plaint which is in the same county without our writ, between A. and B. of the cattle of him the said A. taken and unjustly detained, as it is said, and have that record before our justices at Westminster such a day, &c. under your seal and under the seals of four lawful knights of the same county of them who were present at that record, and prefix the same day to the parties ‡, that they be then there to proceed in that plea as it shall be just: And have you there the names of the aforesaid four knights and this writ: Witness, &c. Let execution of this writ be done, if the aforesaid A. requires it, and otherwise not.*

* This writ, as well as the *pone*, is to remove plaints out of inferior courts, or out of liberties. *Infra* 73. C.

† If by writ, the proceeding is by *pone*. *Supra*.

(a) See 20 Ed. 3. 31. Where beasts were taken in D. in the county of Berks, which was within the precinct of the honour of Wallingford, where the plaintiff had deliverance without writ; and the defendant sued a *recordari* to the sheriff of Berks *quod distrinxerit in feodo, &c.* and at the day the plaintiff came, but the defendant made default. And it was adjudged, (1.) That the plaint was well removed, although the taking was in another county. (2.) That process of outlawry does not lie in

this case on the defendant's default, as it does in replevin. (3.) That yet, if he comes in by process of outlawry, he shall be forced to answer. (4.) That he may avow for damage-feasant, notwithstanding the special cause assigned. *Note*; The beasts here were driven into the county of Berks. *Dyer* 168.

Note; The words (*ut dicitur*) are to be in the writ when brought by a common person only, and not when brought by the king. 38 Ed. 3. 31.

‡ This writ is a summons to both parties, and if plaintiff do not appear on the day, defendant is entitled to sign judgment of *non-pros*, and to have his costs. 1 Term Rep. K. B. 373.

And

And thereby it appeareth that the plaintiff may remove the (b) plaint by *recordari*, without any cause put in the writ; but the defendant cannot remove the plaint by a *recordari* without shewing cause in the writ, as before is said upon the *pone*. And the causes for the defendant ought to be such; *Because the aforesaid B. in pleading affirms, that he himself took the cattle aforesaid in his separate soil, as in his damage there, in which soil the aforesaid A. claims to have common of pasture, as it is said, which plaint, for that it toucheth the freehold (as is aforesaid) in the same county, ought not, according to the law and custom of our kingdom, to be pleaded without our writ: let execution of this writ be done, if the cause be true, and the aforesaid A. requires this.*

27 H. 6. 3.
Quare Plow. 74.
Bro. Court
Baron 22.
Infra 119. K.
125. F.

And if a replevy be sued by plaint in the court of any other lord, than in the county court before the sheriff, then the *recordari* which is sued by the plaintiff or defendant shall be directed unto the sheriff; and the writ shall be such:

So in the *pone*
supra.

The king to the sheriff of Lincolnshire, greeting: We command you, that taking with you four discreet and lawful knights of your county, you go in your own person to the court of W. of C. and in that full court you cause to be recorded the plaint which is in the same court without our writ between, &c. and have that record under your seal and the seals (a) of four lawful men of the same court who were present at that record, &c. and to the parties, &c. as above. Because the aforesaid A. is the bailiff of the aforesaid W. of C. of his court aforesaid, and holds the pleas of the same court, and ought not to be a judge in his own cause.

10 Ed. 3. 42.

(b) If the cause be removed by plea out of the lord's court (it seems of ancient demesne) the *cause* is traversable; *contra*, if it be out of the king's court. 12 H. 4. 12. and 31 Ed. 3. Fitz. Cause de remover 10. and though there be no cause, yet the parol shall not be remanded; *contra*, if in ancient demesne. 12 H. 4. 14. For on a *recordari* out of ancient demesne, the plea arises wholly

on the cause, and therefore the plaintiff may be nonsuit in such *recordari*; but if it be out of any other court, the plea arises upon the mere matter, and therefore the plaintiff cannot be nonsuited there. Kelw. 115.

(a) And Note; A record not being received at the *distringas sectatores* by attorney, was afterwards received by the suitors on a writ out of chancery. 29 Ed. 3. 36.

Another

[* 71]

9 H. 6. 58.
If a recordari
issue to a court
of record to re-
move a plea, al-
though by that
the record be re-
moved, it is void,
if it be not to re-
move indict-
ments.

3 H. 6. 30.
Br. Cause de re-
mover plea 37.

2 H. 8. 5.
But if conusans
be demanded, all
the record in
bank shall be in
the franchise.

9 H. 6. 58.
Oyer and termi-
ner shall not be
removed by re-
cordari by Ba-
bington.

1 R. 3. 4. acc.
Vide 5 Ed. 6.
fo. 91.

34 H. 6. 27.
Ashton cont',
upon a fine re-
moved; and
22 H. 6. 7.

Another *recordari* thus: *You go to our wapentake of H.* or thus, *To our hundred of I.* or thus, *To our tithing of L.* and in that full wapentake; or thus, *In that full hundred;* or thus, *In that full tithing, &c.* and he may shew other causes, as the case requireth. And if the *recordari* be returnable in the common pleas, and at the day of the return the sheriff return it * *tardè*; now the party that sued that *recordari* shall have a *sicut alias recordari* out of the common pleas directed unto the sheriff, &c. 10 Ed. 3. 42.

(b) And if the plea be discontinued in the county, A yet the plaintiff or defendant may remove the plaint into the common pleas or king's bench by *recordari*, &c. and it shall be good, and he shall declare upon the same; and the court shall hold plea upon the same plaint; for if the plaint be (c) continued in the county, and issue joined upon it, yet nothing shall be removed but only the plaint; and in the common pleas the plaintiff may declare anew, &c.

And in a *recordari* to remove a record out of ancient B demesne the writ shall say, *plaint and process*, and not *record*; *quod vide* 39 H. 6. by all the justices; yet the form of the register in the record, as before is said, is, *And have that record.*

If a record be removed out of a court of record by a C *recordari facias*, it cometh in without warrant, and the (*) court shall not hold plea thereof. But if a record cometh

(b) See accordant 3 H. 6. 30. and the like in a *pone*. 13 Ed. 3. *Replevin* 37. 14 Ed. 3. F. *Brief* 278.

(c) And therefore if the defendant be named without any addition in the plaint, he shall have no addition in the *recordari*, though process of outlawry lies thereon. 2 H. 5. 6. (30 H. 6. 30. accordant) adjudged. For the plea here is not held on a writ (but a plaint only) and so not within the intent of the statute.

Note; A *capias* lies on a default in a *pone* for the plaintiff in a *replevin*

by plaint, but not on a default upon a *justicies*. 3 H. 6. 54. See 14 H. 6. 21. Yet if a *withernam* be awarded in a county, the plaintiff shall gage deliverance here. And a *recordari* makes the court judge of the whole matter. 21 H. 6. 40. See 39 H. 6. *Recordari* 5. 20 Ed. 3. *Recordari* 10, 20.

(*) See 9 H. 6. 58, 59, accordant (*sed* 34 H. 6. 42, *contra*) where by a *recordari* the record was removed by the sheriff out of the chancellor of Canterbury's court; but it is there said

cometh in court without a warrant, the party may sue a writ directed unto the justices, that they proceed upon that record *quod coram vobis residet*. If the *recordari facias* bear date before the plaint were entered in the county, yet the record is well removed, because that both courts are courts of record. But if the record be removed out of the court of any other lord by such writ which beareth date before the entry of the plaint, it is not good.

Recaption.

E A Writ of (a) recaption lieth where a man distraineth for rent or service, or other things, and afterwards, pendent the plea, he who distrained doth distrain again for the same rent or service, or other thing, the beasts of the party whom he had before distrained upon; then he who is so distrained shall have this writ, and shall recover damages for the second distress taken; and he who took the distress shall be fined for the wrong, although the first distress were lawfully taken, and although that the rent or services for which he distraineth were arrear, &c. because by the first distress he shall have return of the things taken, until he hath the rent or services for which he distrained. But for damage-
seasant in his lands, a man may distrain the beasts of any

Infra 72. D.
Infra. H.

47 Ed. 3. 7.
Finchd. cont.

said that the court of *Cant'* might have refused to obey the writ, for being a court of record by commission, the plea ought not to be removed by a *recordari*, but by a *corpus cum causa*, or a *certiorari*. And it was held, that seeing the plea was held in this court without warrant, the whole proceedings were void, and therefore the court could not remand it; for the record was never brought in here, but always remained at *Cant'*, and so all was discontinued. Yet see the *Register*, page 6, 7. A *recordari* on a foreign voucher out of *Chester*. A *recordari*

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was to remove a plaint *in curia nostra*, where it was *in cur' regine Mar'*; and ruled that the plaint was not removed. *Trin. 3 Eliz. Mo. 78. 130.* See also *Nat. Br. 12. 12 H. 4. 13. 7 Ed. 4. 23. 1 R. 3. 4.*

(a) *Note 11 H. 6. 14.* If the plaintiff in a recaption be nonsuit, the defendant shall have a return (of the beasts, &c.) and therefore in this case the plaintiff's own counsel alledged death of the plaintiff, after the last continuance, in order to abate the writ, and so to prevent a nonsuit. *11 H. 6. 14.*

R

man

man which he finds upon the land during the damage, so often as he shall find them so doing, because he distraineth them every time for a new trespass and new wrong done in his land. *Tamen quære.*

And if the lord distrain for rent or services behind, F and afterwards, pendent the plea, the lord command his servant to distrain for the same rent or service, by reason whereof the servant or bailiff do distrain again; the tenant shall have a writ of recaption against the lord for the same distress.

And so it seemeth, if the lord distrain his tenant for rent or service, and afterwards the servant or bailiff do distrain the tenant again for the same rent or service, and the lord do agree unto that distress, by joining in aid prayer of the servant or bailiff, the tenant shall have a writ of recaption against the lord. But if the lord distrain for rent or service, and afterwards the lord's bailiff distrain the same tenant for the same rent or service, pending the plea; the tenant shall not have a recaption against the lord, nor against the bailiff, although the bailiff make conuſance in the right of the lord, &c. For it may be that the lord had not notice of that distress, or that the bailiff had not notice of that distress which the lord took before for the same rent or service.

But it seemeth in that case the tenant may have an G action of trespass against the bailiff for the second distress of his cattle for the same rent or service for which the lord had distrained before. 10 Ed. 3. pl. 13.

But if the lord distrain for rent or services, and H afterwards (pendent the plea) the lord distrain the cattle of a stranger for the same rent, and not his cattle who was first distrained; he who is so distrained shall not have a writ of recaption, nor he who was first distrained. For it behoveth him who shall have this writ of recaption, that he have his cattle first distrained before for the same cause for which they were distrained the second time. 12 Ed. 2. p. 13.

But if a man distrain two men's cattle for rent or I service, and afterwards he distrain the cattle of one of

of them again for the same rent or service; now he shall have a recaption alone in his own name. 34 Ed. 2. p. 12.

K And if the lord distrain the beasts of a stranger for rent or service, and afterwards (pendent the plea) the lord distrain the beasts of the same stranger for the same rent or service; the stranger shall have a recaption as well as the tenant, if the beasts were taken at two several times. Post. G.

L And if the writ of replevin be abated, then the writ of recaption shall abate, as it was judged in the time of king Ed. 1.

M And if the lord distrain for rent arrear at a certain day his tenant's cattle, and he sue a replevin, &c. and the lord avow for the rent, &c. and the tenant plead (a) *hors de son fee*; if the lord (pendent that plea) distrain for rent behind at another day after, the tenant shall have a writ of recaption, because the lord's title shall be tried by the first plea. But otherwise it is, if the tenant in the first replevy plead *riens arriere*, or levied by distress, then (pendent that plea) the lord may distrain for the rent behind at a day after, because that the feignior is there confessed, and the tenant shall not have a recaption (b). [72]

A And the tenant or he who is distrained, shall have a recaption before any avowry made, and may aver he distrained for the same cause (a). 47 Ed. 3. 7.

(a) In this case he shall not have advantage of the issue *hors de son fee*, before that the issue be tried; and therefore he avers, that the first taking was (wholly) for the same rent. 28 Ed. 3. 29. *per Cur'*; yet see this point agreed with a diversity, *per Cur'*, 7 H. 4. 4. and 9 H. 5. 1. *per Hankf.* See also 7 H. 4. 4. 18 Ed. 2. p. 8.

(b) The defendant in replevin, before the sheriff, avows for rent, the plaint is removed by *pone*, and the defendant distrains for the same

cause, and a recaption was brought, though only a plaint of record; and it is there agreed, that a recaption lies before avowry made. 9 H. 6. 1. 11 H. 6. 8. adjudged. (*Quære* 45 Ed. 3. 4.)

(a) And see 28 Ed. 3. 92. That where the lord in a replevin avows for one cause, and justifies the recaption for another cause, the plaintiff may aver that the first caption was made by him for the same cause (as the second) See 45 Ed. 3. 4. 32 Ed. 3. p. 5. 9 H. 6. 7.

47 Ed. 3. 7.
9 H. 6. 4.

And in a recaption the defendant shall not avow, B
as he shall do in a replevin, but shall justify the taking,
&c. as he shall do in an action of trespass, for the plain-
tiff shall recover damages only in the recaption for the
(b) contempt that the defendant hath done against the
law, and not for the taking of the cattle, nor for the
detaining of them. And in a recaption it is not ma- C
terial whether the first distress be tortious or rightful.

31 Ed. 3. 5.

And if a plaint be removed out of the county into the D
common pleas by *pone* or *recordari*, and afterwards the
plaintiff be nonsuit in the common pleas, before or after
an avowry made, the lord after this nonsuit may distrain
again for the same cause, and the tenant shall not have a
recaption, because there is not any plea depending;
and yet the plaintiff may sue a writ of (c) second deliver-
ance upon the same record.

And if the lord distrain the cattle of the tenant and a E
stranger, which they have in common, for rent or service,
and afterwards (pendent the plea) the lord distrain the
tenant's cattle only for the same cause; the tenant shall
have a recaption for those cattle. But if the lord distrain
the cattle of the tenant only for rent, &c. and afterwards
(pendent the plea) the lord distrain the cattle of the
tenant and a stranger, which they hold in common,
for the same cause; it seemeth that the tenant shall not
have recaption for those cattle for the interest of the
stranger. *Quære.*

14 Ed. 3.
Recap. pl. 7.

And if the lord distrain and the tenant sue a replevin, F
which is removed into the common pleas, and the conu-
sance be demanded by the bailiff of the freehold, and
granted, and afterwards the bailiff fail to do right unto
the party; if he distrain again for the same cause, the
tenant shall have a recaption, because the lord ought to
remove the plea into the common pleas again by re-
summons, &c.

(b) Note the defence; viz. *De-
fendit vim & injuriam quando, &c.
& quicquid est in contempt' domini
regis & ejus mandatum.* 29 Ed. 3. 28.

(c) Note; Second deliverance does
not lie in a franchise which has
conusance. 38 Ed. 3. 31.

G And a recaption lieth where the lord distraineth other cattle of the tenant than he first distrained, as well as if he had distrained the same cattle again, if it be for one and the same cause, as I conceive. And yet in 19 *Ed.* 3. the issue was taken upon the property of the cattle, as that they were other cattle of the plaintiff, &c. Ant. K.

And a recaption lieth as well where the lord distraineth the tenant again for the same cause, where the plea is depending in the county before the sheriff, as where the plea is depending before justices of record. It must be before one of them. Infra 73. C.

H And if the plea be depending in the county before the sheriff, then the form of the writ of recaption is as follows,

The king to the sheriff, &c. A. hath shewed to us, that whereas you had replevied to the same A. without our writ his cattle which B. took and unjustly detained, and had given day until at your next county, and had attached the aforesaid B. to answer hereupon to the aforesaid A. he the said B. after that attachment, again took the cattle of the aforesaid A. upon the same occasion that he before took them, and detains them as before. And because this is unjust, and manifestly (a) against our peace, we command you, that without delay you cause the cattle of the aforesaid A. to be delivered, until the chief plea between them be determined. And if you shall find that the aforesaid B. again took the cattle of the aforesaid A. upon the same occasion that he before took them, and detains them as before, then have the body of the aforesaid B. before you and the keepers of the pleas of our crown at your next county. And if by your bailiffs by whom the cattle of the aforesaid A. were replevied, and by other honest and lawful men of your county, he should be convicted of a second taking for one and the same occasion, then so chastise him the said B. by amercement, that that chastisement may make others afraid of offending in the like case.

And if the plaint be in the county by writ of replevin pending before the sheriff, then the writ is such :

(a) And note ; The writ shall be lord, but not *vi & armis*. See 9 *contra pacem nostram*, altho' against the *H. 6. 1. 31 Ed. 3. Recapt. 5.*

The king to the sheriff of S. greeting : A. hath shewed unto us, that whereas he lately brought to you our writ of replevyng to him his cattle which B. took and unjustly detains, and you have replevied those cattle to him the said A. and given to him day until at your next county, &c. as in the writ before. And if the plaint be removed out of the county by recordari, then the form of the writ of recaption shall be such :

29 Ed. 3. 28.

The king to the sheriff, &c. A. hath shewed unto us, that whereas B. had taken and unjustly detained the cattle of the aforesaid A. and you upon the complaint of him the said A. as the custom is, had replevied those cattle to the same A. and given to him day until at your next county, and had attached the aforesaid B. to answer upon this to the aforesaid A. and afterwards we commanded you, that you should have the record of the plaint aforesaid before our justices at Westminster such a day last past ; the same B. pending the plea before the said justices, hath again taken the cattle aforesaid, &c. as above.

And if the plaint be removed out of the county by a pone into the common pleas, then the writ of recaption is such :

The king to the sheriff, &c. A hath shewed unto us, that whereas he had lately brought to you our writ of replevyng to him his cattle which B. took and unjustly detains, and you had replevied those cattle to the same A. and given him day until at your next county, and you had attached the aforesaid B. to answer upon this to the aforesaid A. and afterwards we commanded that plaint to be put before our justices at Westminster such a day last past ; the same B. pending the plea before the same justices, again took the cattle of the aforesaid A. upon the same occasion which he before took them, and detains them as before, and doth not permit justice to be done, in contempt of our commands. And because this is unjust and manifestly against our peace, we command you, that if the aforesaid A. shall make you secure touching the prosecuting his claim, &c. then put by gages, &c. the aforesaid B. that he be before our justices aforesaid to answer to us concerning the contempt aforesaid, and to the aforesaid A. of the trespass aforesaid : and have you there the names of the pledges and this writ, and cause those cattle to be replevied to the same A. Witness, &c.

[73]

If

A If a man sue a replevin by writ, and the sheriff send unto the bailiff of the liberty to replevy the cattle, because that the taking was within the liberty, and afterwards the plaint is removed by *pone* into the common pleas, and afterwards the lord, or the party who distrained before, distrain again for the same cause; then he who is so distrained shall have a writ of recaption, and the writ shall be such:

The king to the sheriff, &c. S. hath shewed unto us, that whereas he lately brought to you our writ of replevyng to him his certain horse which J. and A. have taken and unjustly detained, and the bailiffs of the liberty of the abbot of R. of C. (whom you made to have the return of our writ aforesaid) replevied that horse to the same S. and attached the aforesaid A. and J. to answer hereupon to the aforesaid S. and afterwards we commanded that plaint to be put before our justices at Westminster such a day in the third year of our reign; the aforesaid J. and A. have again taken the cattle of the aforesaid S. pending the plea aforesaid before the bailiffs of the aforesaid abbot of his court aforesaid, before whom that plaint, according to the liberties granted to the same abbot by the same justices, is returned to be pleaded, &c. as above.

B And if a lord hath a hundred or a wapentake, and hath power to hold plea *de vetito namio*, &c. and a man distraineth another there, for which he sueth a replevin within the hundred, and pendent the plea there, the party who distrained before distrained the same man again for the same cause; then he who is so distrained shall have a writ of recaption in such form, directed unto the sheriff.

The king to the sheriff, &c. A. hath shewed unto us, that whereas B. had taken and unjustly detained the cattle of the aforesaid A. and the bailiffs of M. of N. upon the complaint of the said A. (as the custom is) had replevied those cattle to the same A. and given to him day until at the next wapentake of their aforesaid lord of N. and had attached the aforesaid B. to answer to the aforesaid A. upon this, and afterwards we commanded you, that having taken with you, &c. you should go to the aforesaid wapentake, and in full wapentake, &c. without our writ between him the said A. and the aforesaid

B. of the aforesaid cattle of him the said A. taken, &c. and that record, &c. the same B. pending the plea, &c. on the same occasion on which they were first taken, &c. put, &c. as before in the writ of recaption.

And now it appeareth by these writs of recaption, C if a man be distrained, and he sue a replevin by plaint before the sheriff in the county, and afterwards hanging that plaint he is distrained again for the same cause, that he shall have a writ of recaption, which shall be directed to the sheriff, and the sheriff shall hold plea upon that writ of recaption.

But if a man be distrained within any liberty, and he sue a replevin there by plaint, or by writ, and pendent that plaint in the liberty he be distrained again for the same cause by the person who distrained before; he shall not have upon that distress a writ of recaption, because the plaint is not pendent before the sheriff, nor before the justices, and the king will not direct the writ of recaption but unto the sheriff. But if the plaint were removed by *pone* or *recordari* out of the liberty before the justices, then the party who was distrained shall have recaption, as well for the distress which was before the writ of *pone* or *recordari*, as if the re-taking had been after the *pone* or *recordari* sued forth.

Supra 72. G.

39 Ed. 3. 36.

And if a man be convicted before the sheriff in a writ D of recaption, &c. he shall be amerced, and render damages unto the party for the contempt. But if he be convicted before the justices in a writ of recaption, he shall be fined, and not amerced, and also shall render damages unto the party for the contempt.

Writ de Withernam.

3 Bl. Com. 148.

2 Inst. 141.

Fortesc. Pref. to

Rep. 18. Raym. 475.

THIS writ lieth where a man taketh the, (a) cattle E or goods of another man, and the party sueth a re-

(a) Note; It lies not on a suggestion only, that the beasts are esloined. 11 H. 6. 1. per Cotton.

plevin

plevin by writ, and an *alias* and *pluries*, and upon the *pluries* the sheriff doth return, that the cattle or goods, &c. are esloined, &c. by reason whereof he could not replevy them, &c. then this writ of withernam shall issue (b) out of that court where the *pluries* is returned, returnable in the king's bench, (b) or common pleas: and the form of the writ is such:

F The king to the sheriff of Lincolnshire, greeting: Whereas we have many times commanded you that justly, &c. to A. his cattle which B. &c. or signify the cause, &c. wherefore you would not or could not execute our command many times directed to you thereupon; and you have signified to us, that after the aforesaid B. took the cattle of the aforesaid A. in your county, he drove them out of the said county into the county of B. whereby you could not replevy them to the same A. We being willing to counteract the malice of him the said B. in this behalf, command you, that you take the cattle of the aforesaid B. in your bailiwick in withernam, and detain them (c) until you can, according to the law and custom of our kingdom, replevy to the same A. his cattle aforesaid, according to the tenor of our commands aforesaid before to you, &c.

And in the writ of *withernam* he ought to rehearse the cause which the sheriff returneth for which he cannot replevy them; as to say,

And after the aforesaid B. took those cattle or beasts he esloined those cattle or beasts, or that ox or horse, out of your bailiwick, so that you could make no delivery thereof to the same A. as you have signified to us: we, &c. command you that

(b) But not out of chancery. M. 42, 43. Eliz. inter Grindal and Pouldal, in C. B. and yet if *elongata* be returned on the *alias*, &c. into chancery then the *withernam*, shall issue out of chancery. 22 H. 6. 21. per Brown.

(c) It seems the defendant shall have a day in this writ, (if he comes in) by attachment, but not otherwise. See 7 H. 4. 27. 43 Ed. 3. 26. 35 H. 6. 47. as if *elongata* be returned on the *pluries* replevin, then there is this

clause inserted in this writ. *Et si the plaintiff fecerit, &c. tunc pone the defendant, &c. ad respondend' tam domino regi de contemptu quam præfato querenti de captione & injusta detentione cattallorum prædictor'.* 2 Eliz. 180. For it seems there had not been any such clause in the *withernam*, if it had been on a plaint in the county. *Vide ibid.* § 44 Aff. 15. But then the whole ought to be removed by the *pone*, and a special return thereof, viz. *quod nullum aliud breve est, &c.*

without

without delay you take cattle or beasts, &c. as the case is, in your bailiwick to the value of the cattle. &c. of the aforesaid A. in withernam, and detain them until you can replevy to the same A. &c.

[74]
Ant. 69.

And there are very many causes that the sheriff may G return upon the *pluries*, wherefore he cannot replevy them, several of which appear in the Register, and may be there seen.

And if the sheriff return upon the *pluries repleg'*, A that he hath sent unto the bailiff of the liberty who hath return of writs, &c. and that the bailiff hath given answer, that he cannot execute the writ, because he cannot have a view of the cattle or goods which were taken; then the court in which such return is made shall award a writ of *withernam* directed unto the sheriff, and the sheriff shall thereupon make his precept unto the bailiff of the liberty; and if the bailiff of the liberty doth not make a return thereof unto the sheriff, then the sheriff shall return the whole matter in court, and thereupon the court shall award a writ of (a) *withernam* and a *non emittas*

(a) See 11 H. 4. 10. In replevin a *withernam* was awarded against the defendant, after which the defendant claims property, and thereon issue taken, the plaintiff gages deliverance, and a writ issues to make deliverance; the sheriff returns *elongata*, and so a *withernam* was awarded against the plaintiff, and on *nihil* returned, a *capias* issued; then the issue is found for the plaintiff, on which he has judgment; and then on a *pluries* returned, the defendant prayed, and had an exigent against the plaintiff; and by *Tyr-whit*, the defendant shall recover damages against the plaintiff for this detainer. *Quare* 1 Co. 75.

Note; The writ of *withernam* is *ad respond' domino regi de contempt' & parti de damno & injur'*. R. Entr. 701. See 35 H. 6. 47. *Danby* and *Moyle*. The defendant shall recover damages

in *withernam* on *elongata* returned, in a writ *de return' habend'*; but others *contra*. See *Dyer* 41. If the plaintiff be non-suit, he may have a second deliverance *instanter*, and it shall be a *supersedeas* to the *return' habend'*; and if a *return' habend'* be sued after a second deliverance granted, the sheriff ought not to execute the second deliverance. Note; This prevents the mischief of a *withernam* against the plaintiff.

N. B. A. brings replevin against B. and has deliverance, and is afterwards non-suited, and a return awarded, and because an *elongata* was returned, B. had the beasts of A. in *withernam*; in this case though the plea was in the county, the replevin is made in C. B. and the second deliverance shall not be of the beasts delivered in *withernam*, but of those that

omittas with the same : and the form of the writ shall be such :

The king to the sheriff of B. greeting : Whereas we have many times commanded you, &c. (until) or could not execute our command many times directed to you thereupon, and R. of C. bailiff of the liberty of Saint Walric, whom you have made to have the return of our writ, hath answered you, that he could not do execution of that writ, because he could not have a view of the cattle aforesaid, as you have signified to us ; wherefore we commanded you, that without delay you should take the cattle of the aforesaid B. in your bailiwick in withernam, and detain them until you could replevy to the same A. his cattle, &c. according to the tenor of our commands, &c. thereupon to you directed, or should signify to us the cause, &c. why you could not, &c. and you have returned to us, that the same R. bailiff of the liberty aforesaid, whom you have made to have the return, &c. hath given you no answer thereupon. We command you, that you do not omit because of the liberty aforesaid, but that you enter into it, and take, &c. in withernam, until, &c. according to, &c. before to you, &c. Witness, &c.

B And if a man distrain any man's cattle, and he sue a replevin by plaint made unto the sheriff, for which the sheriff makes a precept unto the bailiff to replevy them, and the bailiff return at the next county, that he cannot replevy the cattle, because they are esloined, or that he cannot have view of the cattle ; then the sheriff in the same county court ought to make inquiry if it be true which is returned, and if it be found so by the jury, then the sheriff *ex officio* shall make a precept unto his bailiffs in the nature of a *withernam*, to take as many cattle of the other party : and if the sheriff make such precept to take the other's cattle in *withernam*, and the bailiff will not execute the writ, then the party may have a special writ out

that were first taken ; and the defendant shall be forced to gage deliverance of those taken in *withernam*, (*quod nota*,) and yet the plaintiff himself is possessed of the beasts for which he complained, and if he makes

his plaint or count of the beasts delivered in *withernam*, it is not good. 25 Ed. 3. 47. 33 Ed. 3. *Avowry* 256. and 13 Ed. 3. *Replev.* 37. *per cur'*. See also *Dyer* 59. accord. *per cur'* in a second deliverance.

of

of the chancery directed unto the sheriff, commanding him to do *withernam*, and to do execution of the first judgment. And the writ shall be such:

The king to the sheriff, &c. A. hath shewed unto us, that whereas B. and C. had taken and unjustly detained the cattle of the aforesaid A. and the same A. prosecuted before you for replevyng to him the cattle aforesaid according to the law and custom of our kingdom; and that although it was testified by I. your bailiff, whom you sent to replevy the cattle aforesaid of the said A. and found by an inquisition made in your full county, (as the custom is) that the same bailiff could not have a view of the same cattle to replevy them to the aforesaid A. whereupon it was considered in your full county, that the cattle of the aforesaid B. and C. in your bailiwick should be taken in withernam, and detained until his cattle aforesaid could be replevied to him the said A. according to the law and custom of our kingdom; yet the same A. hath not yet obtained execution of the consideration aforesaid, to the no little damage and grievance of him the said A. And because we are willing to relieve the aforesaid A. in this behalf, we command you that if it be so, you take the cattle of the aforesaid B. and C. in withernam, and detain them until you can replevy to the same A. his cattle (a) aforesaid according to the law and custom of our kingdom of England, and according to the consideration aforesaid, &c.

9 Ed. 4. 48.

And by that it appeareth, that the sheriff may award *C withernam*, or replevin sued by plaint, if it be found by inquest in the county, that the cattle are esloined according to the bailiff's return, &c. But upon the *withernam* awarded in the county, if the bailiff do return, that the other party hath not any thing, &c. he shall have an *alias* and a *pluries*, and so infinite, and no other remedy there.

20 Ed. 4. 11.

But upon a *withernam* returned in the king's bench or *D common pleas*, if the sheriff return, that the party hath (b) not any thing, &c. there a *capias* shall be awarded against him, and exigent, and process of utlagary.

Keilw. 71. a.
2 Salk. 582.

In a replevin sued by writ, at the return of *pluries*, the sheriff doth return, *quod averia elongata sunt*, &c. Now

(a) *Vide ante* 69. 2 H. 4. 9. 22 H. 6. 40. 9 Ed. 4. 8. 16 H. 7. 2.

(b) See 28 Ed. 3. 57. and a *sicut alias* there granted.

if the defendant appear, the plaintiff shall not have a *withernam*, because the defendant may gage deliverance.

And if the defendant's cattle be taken in *withernam*, they shall (a) not be delivered to the plaintiff, but the sheriff shall keep them *quousque*, &c. and the same appeareth by the words of the writ: but it is said, that it is the usage in the king's bench, that they shall be delivered unto the plaintiff; by which it seemeth, that the form of the writ of *withernam* there is in another manner than it is in the register.

E (b) In a replevin, at the return of the *pluries* the sheriff doth return, *quod averia elongata sunt*, &c. and the defendant doth appear, and pleadeth that he did not distrain them: now the plaintiff shall not have *withernam*. And so if the defendant at the *pluries* returned appear, and plead that the cattle are dead, in the default of the plaintiff, the plaintiff shall not have *withernam*. *Bro. Vouch. cap. 7.*

Note the last case, 13 H. 7. the defendant at the exigent after the *withernam*.

F And the defendant in some cases shall have a *withernam* against the plaintiff: as, if the defendant hath a return awarded for him, and he sueth a writ *de retorno habendo*, and the sheriff return upon the *pluries*, *quod averia elongata sunt*, &c. he shall have a *scire facias* against the pledges, &c. according unto the statute of *West. 2.* and if they have nothing, then he shall have *withernam* against the

(a) See the like diversity, 2 H. 4. 9. Yet *quare R. Entr. 702* and 704. that the clause of the *withernam*, whether for the plaintiff, or the defendant, is *quod vic' capiat in withernam*, &c. & *ca præfato A. deliberare*, &c. *detinend' quousque*, &c. See for this, 25 Ed. 3. 4, 7. but more fully in *Gage Deliverance* 8. where the sheriff in his county levied goods of the plaintiff in *withernam*, after a return by him awarded; on a nonsuit, if he does not deliver them to the defendant, the plaintiff shall have an action against the sheriff. See 1 Co. 75. b. in his entry of *Breedon's case accordant*.

(b) Note; If in a replevin a *withernam* be awarded, and afterwards the

defendant avows the taking as his own goods, or for heriot, or denies the caption, the plaintiff shall gage deliverance of the *withernam*, but the defendant shall not gage deliverance of the goods taken, and yet the defendant might have come in *pais* and claimed property. 30 Ed. 3. 9. acc. So if *withernam* be taken, and after defendant comes into court, and makes conusance as bailiff to *I. S.* and prays aid of him who joins in aid, the defendant shall have deliverance of the beasts in *withernam*; for it belongs to the lord to make this deliverance of the beasts in *withernam*, and not to his bailiff; *per Horton. 7 H. 4. 28.*

plaintiff

plaintiff of the plaintiff's cattle. *Quod vide Trin. 7 R. 2 (c).*

Moderata Misericordia.

[75.]

14 H. 4. 4.

2 Inst. 27.

THE writ of *moderata (d) misericordia* lieth in case **A** where a man is amerced in a court baron, or other court which is not a court of record, outrageously for trespass or other offence; then he may sue this writ directed unto the lord of the court or unto his bailiffs, commanding them, that they moderately amerce the party according unto the quantity of the trespass, &c. And this writ is founded upon the statute of *magna charta*, cap. 14. *quod nullus liber homo amercietur nisi secundum quantitatem delicti*, &c. And the process upon this writ is *alias* and *pluries*, and attachment, and the attachment shall be awarded against him against whom the original writ was sued; and the form of the writ is such:

2 Inst. 28.

The king to the bailiff of I. of S. greeting: C. hath shewed un- B
to us, that whereas he was lately amerced in the court of your
aforsaid lord of I. for a small fault into which he fell; you re-
quire from him a grievous ransom contrary to the tenor of the
great charter of the liberties of England, wherein is contained,
that no freeman shall be amerced but according to the quantity of
his fault, and this, saving to him his contenement, and saving
to villains there wainage: and therefore we command you, that
you take a moderate amercement from the said C. according to
the measure of his fault, that no farther clamour thereof may
come to us. Witness, &c.

And the attachment shall be always directed unto the sheriff, and the writ shall be such:

(c) See 5 H. 5. 7. by *Hull*, the avowant may have *withernam* notwithstanding, for it was at common law. *N. B. 7 R. 2.* — That it lay not before a *scire facias* returned. See 9 H. 6. 42. a *scire facias* against pledges in an attachment against the par-

ty, and for default at the *distringas* process of outlawry issued. See 9 H. 6. 42. 5 H. 4. 71. 13 H. 7. 2.

(d) See *Rot. Claus.* 38 H. 3. M. 7. A writ to the sheriff, *de non permittendo ad distringend' pro misericordia contra tenorem mag' chartæ.*

The king to the sheriff, &c. If A. shall make you secure, &c. then summon B. and C. bailiffs of D. of I. that they be before our justices at Westminster, &c. to shew wherefore, seeing that the same A. was lately amerced in the hundred or court of their said lord of I. for a small fault into which he fell; and we, at the request of him the said A. commanded the said bailiffs, that according to the tenor of the great charter of the liberties of England, they should take from him a moderate amercement according to the greatness and measure of his fault; they the same bailiffs having despised our aforesaid commands, have not ceased to extort from the said A. a more grievous ransom thereupon by various distresses, in contempt of us, and to the great damage of him the said A. and contrary to the tenor of the great charter aforesaid, as it is said: and have you there the summoners, &c. Witness, &c.

C And if a man be amerced in a court baron, where he did not any trespass, but it is so presented by the inquest, &c. yet it seemeth he shall not have this writ, if the amercement be not outrageous: but if the steward of his own head will amerce any tenant or other party without cause, I conceive the party shall have an action of trespass, if he be distrained for that amercement, and the party ought not to sue his writ of *moderata misericordia*.

D If a feme covert be amerced for trespass, &c. if the husband be distrained for the same, he shall have this writ, if the amercement be outrageous.

E But what shall be said moderate amercement, and what not, appeareth by the words of the said statute, which saith, *secundum quantitatem delicti*: by which it seemeth, that if it exceed the value of the trespass, it is not a moderate amercement; and that shall be intended for the value of the trespass, which is done unto the lord, and not to him who shall have the amercement: for if one tenant do trespass unto another tenant, he shall be therefore amerced in the lord's court by presentment of the trespass; but that amercement shall not be unto the value of the damages which is done unto the tenant, but having regard unto the wrong and offence done unto the lord for the wrongs done unto his tenant.

And

And if a man be nonsuit in a court baron, he shall be **F**
 amerced, and if it be outrageous, he shall have this writ of
moderata misericordia: and so shall the defendant if he be a-
 merced in any suit brought against him, because it is found
 against him; or that he makes default to wage his law at
 the day given him in any plaint sued against him, &c.
 And if the amercement be not moderate, he shall have
 this writ of *moderata misericordia*, &c.

In a court baron, if two be amerced for one trespass out- **G**
 rageously, they shall not join in a *moderata misericordia*, for
 they shall be severally amerced, although the trespass be
 jointly done. And so is it in a plaint sued by two, if they
 be nonsuit, the amercements shall be several, and they
 shall not join in *moderata misericordia*; yet if an amerce-
 ment be set jointly upon them, then they shall join in
 the writ. But it seemeth this amercement ought to be
 assented by persons certain, when they are amerced for any
 trespass. And if the amercement which is set be assented
 by his peers, then this writ of *moderata misericordia* doth
 not lie; for then it is according unto the statute of *mag'*
chart', *quod vid.* 10 *Ed.* 2. in title of actions upon the sta-
 tute in the abridgment.

Post. 76. D.
 Kitchen 44.

And it is called *misericordia*, in English *mercy*, for the **H**
 smallness thereof, by which it seemeth it ought to be less
 than the offence: and then it seemeth they shall be severally
 amerced for a joint offence, because one shall not be char-
 ged for the offence of another; but they shall equally bear
 the charge, and pay the sum assessed.

10 H. 6. 7.
 7 H. 6. 12.

And in the common pleas, the course is, when there are **I**
 divers defendants, to make several estreats of the amerce-
 ments, and to deliver them unto the clerk of the assise, and
 he shall deliver them unto the coroners, and they use to
assere the amercements severally.

And if divers demandants be amerced in a real action for **K**
 their nonsuit, they make the estreats severally upon them,
 and deliver them as before unto the clerk of the assise, who
 delivereth them over to the coroners to *assere* the amerce-
 ments.

But in a personal action in the common pleas, where
 there are many plaintiffs named, and they amerced, the
 clerk

clerk hath forgotten, and cannot shew how the usage hath been to make the estreats against them; but it seemeth with reason, that all shall be done in one manner. For it cannot properly be said that a man hath mercy shewed and offered unto him if he shall pay, or shall be put to more charge for the offence of another person, which himself hath not done: for the nature of the word (mercy) is, that a man shall not be punished so much as he hath deserved, but less; by which it appeareth, that every amercement shall be or ought to be severally assessed upon every one for his own offence, and that to a less sum than he deserveth to pay. *Quære* the usage and manner thereof in the common pleas, and see the statute of *West. 1. cap. 18.* by the 7 H. 6. 12: equity of which statute the usage is accrued, and continues in the common pleas and king's bench, and before the justices of assise; and the clerk of the warrants in the common pleas makes the estreats, and delivers them unto the clerks of the assise, to deliver them unto the coroners to *assere* the amercements, and the coroners assess the amercements, and deliver them unto the clerks of the assises, and they deliver them back unto the clerk of the warrants, who makes the estreats: and then one of the justices of the common pleas, or the clerk of the warrants, goes with the rolls of the estreats into the exchequer, and there puts them before the barons of the exchequer. And the form of the estreat is such:

A Staffordshire: *Of Henry Hart and William Maner, because they had not John Brok, late of B. in the county aforesaid, yeoman, forasmuch as they were bail, &c.——Of John N. for himself and his pledges, because he hath not prosecuted his writ against N. H. of K. in the county aforesaid, husbandman, in a plea of debt, &c.——Of Stephen White, for his false clamour against D. of, &c. in a plea of detinue, &c.* And so the estreat doth rehearse the cause for which he was amerced, &c. For the justices do not assess any sum for any amercement upon any person, but make their entry as abovesaid; and then the coroners set the sum upon the heads of every of them; as, four shillings or six shillings, as they shall think fit in their discretions, *viz.* severally upon every of them.

And by the statute of *Magna Charta*, cap. 14. no spiritual B person shall be amerced according to his spiritual benefice, but according unto his lay fee, and according unto the quantity of the trespass; and if he be otherwise amerced, he shall have a writ upon the said statute against the sheriff, or him who amerced him. And the writ shall be such:

The king to the sheriff, &c. Whereas it is contained in the great charter of the liberties of England, that no ecclesiastical person shall be amerced according to the quantity of his ecclesiastical benefice, but according to his lay fee; and yet we understand from the complaint of S. parson, &c. that although he holds no lay fee, nevertheless you have at your own will grievously amerced him the said S. in your torn, in such a hundred, upon some matters presented before you in the same torn, he the said S. not having been thereupon summoned, nor lawfully convicted, and that you unjustly intend to levy that amercement upon his ecclesiastical goods, to the no small damage of him the said S. and contrary to the charter aforesaid: we being unwilling that he the said S. should be aggrieved in this matter, do command you, if it be so, that then you do not cause him the said S. to be in such manner amerced before you, or any amercement to be levied upon his ecclesiastical goods contrary to the tenor of the charter above mentioned; and the distress, if any, &c. witness, &c.

And upon this he may sue an *alias* and *pluries*, and attachment, unless the sheriff do according to the writ directed unto him.

Ant. 75.
Kitch. 43.

And it seemeth that the party may sue a writ upon the C statute by *pone*, &c. if he will, against the sheriff or the other who amerced him, because that the statute is a (a) prohibition in itself, and need not sue such a writ as aforesaid.

And by the statute of *Magna Charta* every amercement in D a court baron ought to be assessed by two tenants of the manor upon oath. And if the steward or bailiff will assess

(a) And therefore it is no plea to say, that no prohibition was delivered to him. And note; if the amercements be afterwards assessed *per pares*,

this writ does not lie. See there the writ brought against the bailiff. 18 Ed. 2. accordant, *Sur le stat.* 34.

any amercement without affearment, then he who is amerced shall have such writ :

The king to the bailiffs of W. bishop of S. greeting : whereas it is contained in the great charter of the liberties of England, that no free man shall be amerced for a small fault, but according to the measure of his fault, and for a great fault according to the greatness of the fault, saving to him his contenment, and a merchant in the same manner, saving to him his merchandise, and any other person's villain than our own, shall be in the same manner amerced, saving his wainage, if he fall into our hand ; and none of the said amercements shall be assessed but by the oath of honest and lawful men of the vicinage, as in the same charter is more fully contained : and now we understand from the complaint of the men and tenants of the manor aforesaid, that you wilfully assess those men and tenants in great sums of money, when they fall into the amercement of the court of the same manor for any duty, not permitting that the same amercement be assessed by the oath of the men and tenants of the same manor, to the no small damage of them the said men and tenants, and contrary to the tenor of the charter aforesaid : we, willing that charter to be inviolably observed in all and every one of its articles, do command you that you, wholly ceasing from wilfully assessing such sums upon the men and tenants aforesaid when they fall into amercement, do permit such amercement to be assessed by the oath of honest and lawful men of the same court, according to the tenor of the charter aforesaid. Witness, &c.

And he may sue an *alias* and a *pluries* thereupon, *vel causam nobis significes*, and afterwards an attachment against the bailiffs, or him who assesseth the amercement.

[77]

Writ de Nativo habendo.

A THE writ (a) *de nativo habendo* lieth for the lord who claimeth inheritance in any villain, when his villain is run from him, and is remaining within any place out of the manor unto which he is regardant, or when he

(a) And note; in a writ of neif, enfranchised the villain, in 26 Ed 3. the plaintiff sued by attorney; he had 76.

departeth from his lord against the lord's will : and the writ shall be directed unto the sheriff; and if the sheriff will (b) not serve the writ, he shall have an *alias* and *pluries*, and attachment against the sheriff, if need be.

But if a man have an estate but for term of life, or for years, in a villain, it seemeth he shall not have this writ of *nativo habendo*, because this writ is in the nature of a writ of right to recover the inheritance in the villain, and the same appeareth by the count in the writ: *quere tamen*. B

V. 1 & 2 Eliz.

Dyer 173.

where this

writ lieth,

and out of

what court.

And the sheriff may seize the villain, and deliver him unto his lord, if the villain confess unto the sheriff that (a) he C

And vide 1 Ed. 4. 8, 9. a good case. 7 H. 4. 45.

is

(b) See if the *pluries* determines the power of the sheriff in this writ also, as in replevin, it was much doubted, but it seemed it should; and if the *pluries* be returned in B. R. they may hold plea there. 11 H. 4. 49. It seemed also, that if on the first writ the sheriff sent to the bailiff of the franchise, who does nothing (or gives no answer) the sheriff cannot return this, but ought to execute the writ himself.

See 7 H. 6. 31. on a *nativo habendo* removed out of the county by *pona*, whereon the sheriff had returned *non inventus*, a *capias* lies, and on *non inventus* returned thereon, a *latitat* went to the sheriffs of London.

(a) If on a plaint in replevin (as 29 Ed. 3. replevin 35.) or on a writ of replevin, the defendant claims property, and it is received by the sheriff (as 30 Ed. 3. 22. 31. Ed. 3. *Propr' proband'* 4. as it seems for taking issues received by the sheriff) a *Propr' probanda* shall issue, although the sheriff cannot make replevin, and day shall be given to the defendant in bank to answer to the king for the contempt, and to the party for the damages on the claim; yet it seems the replevin shall continue to answer damages to the plaintiff for the taking. 1 Ed. 4. 9. b. 7 H. 4. 23, 46. 21 Ed. 4. 76.

But if it be found for the defendant, it seems that all is determined, and the plaintiff cannot have a new replevin, for the sheriff cannot execute it, but he may have a writ of trespass. 31 H. 6. *Propr' proband'* 5. 31 Ed. 3. 16. 3. or else he may remove the plaint in the county by *recordari*, (though in truth it is determined there, by the claim of property, &c.) and so try the property *de novo*, and the plaintiff shall not be estopped by the trial in the *Propr' proband'*, which is only an inquest of office, 30 Ed. 3. 21, 22. 31 Ed. 3. replevin 35.

And note; if the property be found for the plaintiff, and at the day of the return, the sheriff returns an esloiment, and the defendant makes default, a *withernam* shall be granted, and so a *capias*, *pluries* and exigent. 39 Ed. 3. 30. But some held that the plaintiff in that case shall recover the whole in damages. See 7 H. 4. 28. per Hull, when the defendant comes in by attachment after property found for the plaintiff, the plaintiff may have two counts against him, one on the *Propr' probanda*, and another on the replevin. 7 H. 4. 46. If the replevin be returnable in chancery, *sicut alias vel causam*, &c. And the claim of property returned thereon, then the

is his villain ; but if the villain say to the sheriff, that he is frank, then it seemeth that the sheriff ought not to seize him : as it is in a *replevin*, if the defendant claim property, the sheriff cannot replevy the cattle, but the party ought to sue a writ *de proprietate probanda*: and so if the villain say that he is a freeman, &c. then the sheriff ought not to seize him, but then the lord ought to sue a *pone* to remove the plea before the justices in the common pleas, or before the justices in eyre. But if the villain purchase a writ *de libertate probanda* before the lord hath sued the *pone* to remove the plea before the justices, then that writ of *libertate probanda* is a *superfedeas* unto the lord, that he proceed not upon the writ of *nativo habendo* till the eyre of the justices, or till the day of the plea be adjourned before the justices, and that the lord ought not to seize the villain in the mean time.

But at this day the writ of *libertate probanda* is of no value or effect, because by the statute of 25 *Ed. 3. cap. 18.* it is ordained that the lord may seize his villain and alledge villainage in an action brought against him by the villain, although he hath a writ *de libertate probanda* depending, which is determinable before the justices *in banco*, or the justices in eyre.

D And if the lord sue a *nativo habendo*, and the villain purchase this writ of *libertate probanda*, by that the sheriff shall not proceed farther in the writ of *nativo habendo*, but the whole plea shall be adjourned before the justices in eyre ; and then the writ of *nativo habendo* and the record shall be sent before the justices in eyre, and the lord shall declare thereupon, and the villain shall make his defence, and plead thereunto ; and the villain shall not declare upon the writ *de libertate probanda*, nor shall any thing be done thereupon ; for that writ is but a *superfedeas* to surcease for the time, and to adjourn the record and the writ of *nativo habendo* before the justices in eyre: and that appeareth by the forms of the writs of *nativo habendo* and of *libertate probanda*, which are as follows: and first as to the form of the writ of *nativo habendo*, it is this:

the *Propr' probanda* shall issue out of the chancery ; but if on the *pluries* the claim is returned in *B. R.* or *C. B.*

the *proprietate probanda* shall issue from those courts. *Dyer 173.*

Post. 79. A.

The king to the sheriff, greeting: we command you, that just-
ly and without delay you cause A. of C. to have B. his villain
and fugitive, (who fled from his land after the coronation of
the king lord Henry, son of king John,) with all his cattle and
his whole train, wheresoever he shall be found in your bailiwick,
unless he be in (a) our demesne, and we prohibit, upon pain of
our displeasure, any from unjustly detaining him. Witness, &c.

And the writ of libertate probanda is in this form:

Libertate probanda.

THE king to the sheriff, &c. A. and B. her sister, have
shewed unto us, that whereas they are free women, and
ready to prove their liberty, F. claiming them to be his niefs un-
justly vexes them; and therefore we command you, that if the
aforesaid A. and B. shall make you secure touching the proving
of their liberty, then put that plea before our justices at the first
assises, when they shall come into those parts, because proof of this
kind belongeth not to you to take; and in the mean time cause the
said A. and B. to have peace thereupon, and tell the aforesaid F.
that he may be there, if he will, to prosecute his plea thereof
against the aforesaid A. and B. And have there this writ.
Witness, &c.

11 H. 4. 48.
Gascoign ac.

And now by these two writs it appeareth, that the lord
who sueth the writ *de nativo habendo* shall pursue his (b)
plaint

(a) In a *latitat* to the sheriff of London, on a *nativo habendo* removed hither by *pone*, the sheriff returne *quod civit' Lona' est antiquiss' civit camera regis, antiquu' dominicum regis, & consuetudinem habet & habuit a tempore quo, &c. Quod si aliquis senilis conditionis manserit in civitate per unum annum & unum diem quod ex tunc non erit capt' virtute brevis de nativo habendo.* And it was moved, that the sheriff should be amerced. 1. For that by the record of domesday, it appears, that it is not ancient demesne. 2. For that

this custom of London is against common right, and prejudicial both to citizens and strangers, and therefore void. 3. That it is a custom in the negative, and so does not lie in usage. 4. Tho' the custom were good, yet it should not come in by the sheriff's return, but by plea. But it is otherwise of ancient demesne, because there the writ warrants such a return, &c. See 7 H. 6. 32. and the residue thereof. 8 H. 6. 3. 4.

(b) See accord. by Lodd. for the sheriff has nothing to adjourn in eyre; but

plaint upon the writ of *nativo habendo*, and shall declare thereupon, &c. and that the villain shall make defence, and upon that writ *de nativo habendo* the freedom shall be tried. And also it seemeth by these writs, that a writ *de libertate probanda* doth not lie, unless upon a writ *de nativo habendo* sued out before by the lord.

H But it appeareth in 12 H. 3. *Itin' North'*, that the villain sued a *libertate probanda*, & *obtulit se* at the fourth day against the lord, and he did not appear, but made default, for which, upon the default of the lord, the villain was enfranchised; and he had writ unto the sheriff, that he do not suffer the lord to trouble him after: *Quod vide* in title *Villainage* in the abridgment; *vide* 47 H. 3. a good case of that matter. 12 Ed. 3. *Villainage* 44. Fitz. Villainage 39.

A And when he sueth the *nativo habendo*, he shall enter a plaint before the sheriff in the county; as, if he sue a replevin by writ unto the sheriff, he ought to enter his plaint before the sheriff; so shall he do upon the *nativo habendo*: and the plaintiff shall recite that he is his villain, and that he fled from him, &c. And by the writ of *libertate probanda* that plaint shall be removed before the justices of eyre, or before the justices *de banco*, and then the matter shall be tried before them, &c. Or the lord may remove the plaint by a *pone* before the justices of the common pleas, and thereupon he shall have process against the villain, &c. for the sheriff cannot determine the title of villainage in the county; and that is proved by the words in the writ of *libertate probanda*, viz. *Quia hujusmodi probatio non pertinet ad te capiend'*, &c. 11 H. 4. 49. *per Norton*. [78]
Fitz. Villainage 3.

but by *Rolph*, if the lord do purchase a *nativo habendo*, and after that a *pone*, and then a *libertate probanda*, and deliver it to the sheriff, and be afterwards nonsuit, and then purchase a new writ of *nativo habendo*, the sheriff may adjourn it for (trial of) the *libertate probanda*. 11 H. 4. 49. *Quære*.

If in a *libertate probanda*, the parties are at issue on the franchise and villainage, if pending the issue, the defendant seizes the plaintiff, he shall be fined; *contra*, in trespass for a villain, and the lord, pending the issue, seizes his goods. 9 H. 5. 1. b.

11 H. 4. 43.
Gascoign. Old
Nat. Brev. 46.
25 Ed. 3. 49.
Villainary 12.
that the party is
without remedy,
if not against the
sheriff.

And it is good for the lord, when he sueth the *nativo* B
(a) *habendo* unto the sheriff, that forthwith he sue his
pone unto the sheriff to remove the plaint before the
justices of the king's bench: for if after the *nativo habendo*
sued, the lord sue a *pone* to remove the plaint before the
justices *de banco*, and before he delivereth the *pone* to the
sheriff, the villain sue the *libertate probanda*, and deliver
the same to the sheriff, by which the sheriff adjourneth
the plaint before the justices in eyre, and returneth the
matter upon the *pone* before the justices of the king's
bench; now the justices of the bench ought not to pro-
ceed upon that *pone* against the villain, because that the
sheriff hath returned, that he hath adjourned the matter
before the justices in eyre by the writ of *libertate probanda*,
quod vide Hil. 26 Ed. 3. and yet the *pone* was of elder
date than the writ *de libertate probanda*, but was not de-
livered unto the sheriff before the *libertate probanda*.

And if a man sueth several writs of *nativo habendo* C
against two, the two may join in a *libertate probanda*,
notwithstanding the several writs.

And a man can join in a writ of *nativo habendo* but D
two villains, but in favour of liberty many villains may
join in a *libertate probanda*.

(a) See a notable case, 11 H. 4.
48. In a *nativo habendo*, at the *pluries*
the sheriff returns a *mandavi ballivo*,
who did nothing thereon, and it ex-
cused him of contempt. (*Quære*,)
then a *non omittas* issued on which he
returned, that before the delivery
thereof to him, the defendant had de-
livered him a *libertate probanda*, so
that he could do nothing; and by all
the justices he was amerced. 1. Be-
cause after the return of the writ, the
sheriff had nothing to adjourn by force
of the *libertate probanda*. 2. Because
the *non omittas*, though awarded after
the *libertate*, ought to be executed,
whether it issued by wrong or right;

(so it seems to differ from a *pone*, for
that is only to remove the record,
which in effect was removed before,
by the adjournment, by force of the
libertate probanda, but the *non omittas*
is to another intent.) 3. For that
by the *pluries*, the power of the sheriff
to hold plea is determined, *sed quære*,
for then to what effect are these words
in the writ, [*habere facias*]. And
also, if so, no *non omittas* ought to
issue, but only process against the
party, but afterwards the sheriff in
this case was amerced, and a *non*
omittas sicut alias awarded.

(a) And

E (a) And it seemeth that the villain may sue a *libertate probanda* returnable before the justices *de banco*, as well as before the justices in eyre, although there be no such writ in the register. But if such writ be made returnable before the justices *de banco*, it seemeth it is good, and they shall proceed thereupon as if it were before justices in eyre.

F (a) In a writ of *niefse*, if the plaintiff be nonsuit after appearance, the defendant shall be for ever enfranchised; *quod vide M. 12 Ed. 2.*: and upon departure in despite of court, where he appeareth, and saith he will seek counsel, and afterward is demanded, and maketh default, there the villain shall be for ever enfranchised: and so upon a *retraxit*, if the plaintiff say that he will not pursue his writ of *niefse*, the defendant shall be enfranchised for ever (b).

8 Ed. 4. 16. by Martin, all of the blood may join. But if they be of the half blood they shall not join. Br. Villainage 68. 6 Ed. 2. Vill. 26. after a nonsuit he was enfranchised during the plaintiff's life. Br. Villainage 26. 29 Ed. 2. cont. before appearance. 19 Ed. 2. Vill. 31. 39 Ed. 2. Fitz. Vill. 34. the plaintiff counts upon a confession, and the defendant acknowledges it, and after the plaintiff was nonsuit, and *per Cur'* it is an enfranchisement for ever. 30 Ed. 1. Vill. 46. Harvy and Mitton, she is enfranchised but during the marriage; Broughton cont. King took the difference where the lord marrieth the niefse, and where a stranger marrieth her.

G And if a free man marry a woman who is a *niefse* unto another, she shall be for ever free, although that the husband die, and she survive him, and that by *Britton* in his book *in favorem libertatis* (c). And it seemeth reasonable that the law should be so, because that she and her husband are but one person in law, and she ought to be of the same nature and condition to all intents as her husband is; but the husband is for ever free without any condition in law or otherwise, and by consequence the wife ought to be of the same condition and nature as her husband is; and then if he be once clearly discharged of villainage to all intents, she cannot be a *niefse* afterwards without her own special act, as by divorce, or confession in a court of record, and that in favour of liberty: for a free woman shall not be villain by taking a villain to be her husband.

28 Aff. 34. Br. Vill. 23. A frank man marries a niefse with licence, the lord enfeofed I. S. the husband died, the wife is niefse, as before, vide 18 Ed. 2. Vill. 35. cont. and there by Devon she remaineth niefse, but the seizure is suspended. 13 H. 3. Vill. 43. she shall not be produced to prove villainage during the coverture. 30 Ed. 1. Vill. 46. cont. 31 Ed. 3. Vill. 21. cont. See Litt. 42.

(a) See 6 Ed. 2. Villainage 26. Litt. 45. 12 Ed. 2. Villainage 24. 19 Ed. 2. Villainage 31. contr. *Quare* 13 H. 3. Villainage 43.

(b) See 4 Ed. 4. 25. 30 Ed. 2. Villainage 46. 18 Ed. 2. Villainage 30. con. 29 Aff. 4. con.

(c) See accordant 11 H. 48. 2 H. 4. 25.

13 Ed. 1.
Vill. 38.
19 H. 6. 32.
ac. 19 Ed. 2.
Vill. 32.
Confin female
shall not be
brought to prove
the male villain.
13 Ed. 3. Vill.
36. ac. Old Nat.
Brev. 46. ac.
Old Tenures Br.
Vill. 68.

In a writ of *niefse* it behoveth the lord who sueth the writ **H**
to bring proof with him, namely, two persons at the least,
who are of the villain's blood, that will confess themselves
to be villains, otherwise the writ shall abate: and what shall
be sufficient proof, and what not, see in the title of
villainage in the abridgments. But in a *nativo habendo*,
after the plea is removed by a *pone*, if the defendant will
confess himself to be villain, the plaintiff needeth not
to bring any proof thereof.

If two bring a *nativo habendo*, the nonsuit of one of **I**
them is the nonsuit of them both; for summons and
severance lieth not in that writ. But in a *libertate pro-*
banda it is otherwise, for there the nonsuit of the one
shall not prejudice the other.

And it appeareth by the Register, that the sheriff **K**
cannot seize the villain by force of this writ of *nativo*
habendo, although that the words of the writ are, *Habere*
facias A. nativum & fugitivum suum; for these words
give him power to hold plea, and not otherwise, as it
appeareth in 2 H. 4. in a *faux imprisonment*. But if the
villain doth confess unto the sheriff that he is a villain,
then it seemeth reasonable that the sheriff ought to seize
him, saving the opinion of that book. But the statute
now maketh the matter clear, that the lord may seize
him, and so the sheriff at his request. And the process **L**
in the *nativo habendo* is summons, attachment and
distress.

In a *nativo habendo* the plea was removed by a *pone*, **M**
and the sheriff returned thereupon *non est inventus*, for
which a *capias* was awarded, and after upon return of
non est inventus a *latitat* was awarded, upon a surmise
made that he was in a foreign county. P. 7 H. 6.

[79]

And in the *libertate probanda* the process is as upon the **N**
pone sued to remove a plaint in the county upon a reple-
vin, summons, attachment and distress. And the form
of the *pone* upon a *nativo habendo* is such:

The king to the sheriff, &c. Upon the petition of the
plaintiff put the plea which is in your county by our writ be-
tween A. and B. whom the same A. claims to be his villain
and fugitive; and summon, &c. the aforesaid B. that he be
then

then there to answer the aforesaid A. thereupon: and have there the summoners and this writ and the other writ.

A And if the villain do remain in ancient demesne of the king which is in the king's (a) hands, and have remained there by a year and a day, then the lord cannot have or maintain this writ of *nativo habendo* so long as he remaineth there: but if he have not remained within the ancient demesne of the king a year and a day, but for half a year, or other time which doth not make a year and a day, then the lord shall have such writ unto the sheriff:

The king to the sheriff, &c. We command you, that unless A. whom B. claims to be his villain and fugitive in your county by our writ, hath remained in our demesne of S. for one year and a day without challenge, let not the plea aforesaid remain in the county aforesaid, for that he hath remained in our demesne for less time. Witness, &c. Ant. 77. E.

But it appeareth by the writ, that if the lord claim him within the year and day that he came into the ancient demesne, that then the villain shall not have advantage of his staying there: but it seemeth that the lord ought to claim the villain within every year and day that the villain stayeth within ancient demesne, as he shall make his continual claim to save his entry into any land. But if the villain do remain in any other manor than in ancient demesne, which is in possession of other lord than the king, and there stay a year and a day, or for many years, without any claim made by the lord, notwithstanding that, the lord may take and seize him, or have a special writ of *nativo habendo* against his villain directed unto the sheriff, as above is said.

B If a man purchase a villain of another unto him and his heirs, and the villain run from him, he shall not have this writ *de nativo habendo*, because he hath no proof of his blood who will confess themselves to be villains unto the

24 Ed. 3.
Br. Vill. 26.

(a) See Nat. 46. *contra*, if it be in the hands of any other lord, but note; the lord of a manor in ancient demesne might have villains regardant at his death. 39 Ed. 3. 36.

and *quære*, if all tenants of ancient demesne lands were not originally villains, and so came to the king's grantees.

plaintiff; and if he bring men of the villain's blood, who confess themselves to be villains to a stranger, and not to the plaintiff, it seemeth that this is not sufficient proof.

Quere tamen.

And the lord may have a writ unto the sheriff to assist C him to distrain his villains, and the writ is, *The king to the sheriff, &c. We command you, that you be in aid of A. of F. when he himself is not able to distrain his villains of N. to do to him the customs and services due and accustomed. Witness, &c. See the statute Anno 1 R. 2. cap. 6.*

And when the king makes tallage of his ancient demesne lands in his hands throughout the realm, then the other lords who have ancient demesne lands of the king in fee-farm, shall have such writ to tax them; and the writ is such: D

The king to the sheriff, &c. Whereas we have caused our demesnes throughout England to be taxed, we command you, that if the manor of C. was at any time our demesne, or that of our ancestors heretofore kings of England, and hitherto hath been accustomed to be taxed, then cause A. to have a reasonable tallage of his free tenants in the manor aforesaid, as hath before been accustomed to be done. Witness, &c.

And if the king's villains do convey themselves out of E the manor, then a special writ shall be directed unto the sheriff, that he inquire by the oaths of honest and good men the names of them, and where they abide, and that he make them return, and abide within the manors as before.

If a woman sueth a writ of *libertate probanda*, the form F of the writ is such: *Alice hath shewed to us, that whereas she is a free woman, &c. and ready to prove her liberty, &c. as above.*

Writ de Securitate Pacis.

G **T**HIS writ lieth when a man is in fear or doubt that another will beat or assault him, and lieth properly where one man doth threaten another man to kill, beat, or assault him; then may he come into the chancery, and pray to have such a writ unto the sheriff, and the form of the writ is such :

*The king to the sheriff of Lincolnshire, greeting : Because A. of B. hath heavily complained to us, that C. openly threatens him concerning his body ; we command you, that you cause the same A. to have of the aforesaid C. our strict peace according to the custom of England, so that you may be secure that damage or peril do not come to the same A. in his body, by the said C. or by his procurement. Witness, &c. Or thus : Concerning the burning of his houses openly threatens, we command you, &c. so that, &c. damage come not to the same A. in his houses aforesaid, by such burning, &c. And a man may have a writ for the safety of his body, and for the burning of his houses, all in one writ. And he may have an *alias* and a *pluries*, and attachment against the sheriff, if he does not his office, &c.*

H And by the ancient course of law he ought to take his oath upon a book before he have this writ, and this in chancery before a master of that court : but now it is the practice for persons to sue forth such writs by their friends, who will sue for them without any oath made; and the same is ill done, because they are many times sued, more for vexation than for any good cause; and the justices of the king's bench will not grant any writ for surety of the peace, without making oath that he is in fear of corporal damage. And the justices of peace ought not to grant any warrant at the suit of any one to find sureties of the peace, if the party who requires the same will not take his oath that he requireth the same not for malice, but for the safety of his body.

A And if a man have sued a writ against one directed unto the sheriff, and the sheriff take security of him to keep

Fitz. Just. del
Peace.

See 21 Ja. 1.
c. 8.

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keep the peace, and afterwards he break the peace against him who demanded the same; he who demanded the surety of peace shall have attachment against him to find sureties; and the writ is such:

The king to the sheriff, &c. If A. shall make you secure, &c. put, &c. B. that he be before our justices, &c. to shew wherefore, seeing that the aforesaid B. threatened the aforesaid A. concerning his body, and the aforesaid A. upon that occasion brought to you our writ to have the peace thereupon, he the same B. although he gave you security, that by him or his procurement, damage or peril should not come to the aforesaid A. of his body, nevertheless the aforesaid B. with force and arms hath made an assault upon the aforesaid A. at W. and him, &c. to the manifest contempt of us, and to the great damage of him the said A. and against our peace: and have you there the pledges and this writ. Witness, &c.

And upon this writ the plaintiff shall recover damages, and the defendant shall be fined for the contempt, if he be found guilty.

And if a man will have a writ for surety of the peace B against any one who dwelleth within the cinque ports, then he shall have a writ out of the chancery directed unto the constable of *Dover*, and unto the warden of the cinque ports, and the writ shall be such:

The king to his beloved and faithful N. his constable of Dover, and to the warden of his cinque ports, greeting: We command you, that having heard the complaint of A. because that B. being of the liberty of the cinque ports threatens, &c. and having called before you the parties aforesaid, and having heard their reasons on each side, that hereupon you cause to be done to the same A. due and speedy fullness of justice, as of right, and according to the law and custom of the aforesaid ports ought to be done, and at other times hath been accustomed to be done in the like case. Witness, &c.

But it is a common opinion, that the security which the C sheriff ought to take of the party who is to find sureties for the peace, ought to be taken by bond, that is to say, to bind the party and his sureties by bond, that he keep the peace, and that he burn not the houses, &c.

1 Ed. 3. c. 16. But now after the statute of 1 *Ed. 3. cap. 16.* which appointeth

appointeth that certain persons shall be assigned in the chancery to keep the peace, there are other forms of writs for the ease of the people who will have the peace against any persons, which writs shall issue out of the chancery; and some of them are directed unto the justices of the peace, and unto the sheriff, and some are directed only unto the sheriff: and these writs are of other form which is such:

D *The king to his beloved and faithful I. &c. and his companions our justices assigned to keep our peace in the county of S. greeting. Or thus: To the keepers of our peace in the county of S. &c. and to the sheriff of the same county, and to every one of them, greeting. Or thus: To the sheriff of S. greeting: A. hath besought us, that whereas he is grievously and manifestly threatened by E. of his life and maiming of his members, and also of burning his houses, we would provide for the security of him the said A. in this behalf; we granting the supplication aforesaid, command you, (or thee) firmly injoyning that you make the said E. to come personally before you, (or thee) and to find sufficient manucaptors who will be bail for him under a certain penalty to be imposed upon them by you, (or thee) for which they or you will answer to us. Or thus: And that by any means ye (or you) compel him the said E. to find sufficient security under the penalty of 100 l. to be paid to our use, or every one of them in the penalty of, &c. that he will not do, or procure to be done, any damage or ill to him the said A. of his body, or his houses by such burning. And if he shall refuse to do this before you, (or thee) then that you (or ye) commit him the said E. to our next gaol, to be kept safely in the same, until he will do this freely: and when you (or ye) shall have taken that security, that without delay you (or ye) acquaint us therewith, and certify us thereof in our chancery under your or any of your seals (or under thy seal) distinctly and openly, ye (or you) remitting to us this writ.*

E And by this form of writ, when the writ is in the plural number, the writ is directed unto the justices of peace, or unto the justices and sheriff. And when it is in the singular number, the writ is directed unto the sheriff only, or unto one justice only.

And

Infra 238.
 2 Lev. 128.
 1 Hawk. P. C.
 253. 6th edit.

And if the husband threaten his wife to beat or to kill F
 her, she shall have this writ,

A. the wife of B. hath besought us that whereas she is grievously and manifestly threatened by the aforesaid B. of her life, and maiming of her members (as above until) you will answer to us, that by any means you do compel, &c. that he shall well and honestly treat and govern the aforesaid A. and that he shall not do, nor procure to be done any damage or evil to her of her body, otherwise than what reasonably belongs to her husband, for the purpose of the government and chastisement of his wife lawfully, &c.

And if a man be in variance with other men, and he G
 be in doubt that damage or hurt will come unto him, or his servants or his goods, by reason of this variance; then he shall have a special writ against them directed unto the sheriff, that he cause them to find security that they do not damage or hurt him in his body, or his servants, or other his goods, in a certain sum, &c. And if they will not find security, that then he arrest them and keep them in prison, until they will find sureties: and that the sheriff certify all that is done upon the same into the chancery, upon pain, &c. as it appeareth by the Register. And that security ought to be taken by recognizance, as A
 it seemeth; *tamen quære.* And when a man hath purchased such writ of *supplicavit*, directed unto the justices of peace, or unto the sheriff, or unto both, against any man, then he against whom the writ is sued may come into the chancery, and there find sureties in the chancery, that he will not do hurt or damage unto him who hath sued the writ; and then upon that he shall have a writ of *superfedeas* out of the chancery, directed unto the justices of peace, or unto the sheriff, or unto one of them, reciting that he hath found sureties in chancery according to the writ of *supplicavit*, and reciting the writ of *supplicavit*, and the manner of security that he hath found, and the sum of money in which they are bounden; commanding the justices and sheriff that they surcease to arrest him, &c. or compel him to find sureties, &c. and if they have arrested him for that cause, and for no other, that then they deliver him, &c. See the form of the

writ

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Fitz. Just. de
 Peace 9.
 Post. 238.

writ in the Register. And if the party who ought to find sureties, cannot come into the chancery to find such surety, then his friend may purchase a *supersedeas* in the chancery for him, reciting the writ of *supplicavit*, &c. and that such a one and such a one are bounden for him in the chancery in such a sum, that he shall keep the peace according to the writ of *supplicavit*: and the writ shall be directed unto the justices of the peace and sheriff, that they or some of them take surety of the party himself, according to the writ of *supplicavit*, to keep the peace, &c. and that then they surcease to arrest him; and if they have arrested him for that cause, that they then deliver him.

B And sometimes the writ of *supplicavit* is made returnable into the chancery at a certain day; and if it be so, then if the justices do not certify the writ, nor the recognizance, and the security which is taken, the party who sued the *supplicavit* shall have a writ of *certiorari* directed unto the justices of peace, to certify the writ of *supplicavit*, and what they have done thereupon, and the security which is found, &c. and so the party shall have such *certiorari* unto the justices of peace, to certify the security taken upon *supplicavit*, although the writ of *supplicavit* be not returnable in the chancery.

C And so if a man require surety of the peace in the county against any man, he shall find sureties in the county before the justices of the peace, &c. he who requireth the security may sue a writ of *certiorari* directed unto the justices of peace, to remove the surety of peace, and the recognizance taken thereupon; and to certify that recognizance, and security taken, under the seals of the justices of peace, or one of them. And if the *certiorari* be sued upon a writ of *supplicavit*, then the *certiorari* shall rehearse the writ of *supplicavit*; and if it be sued upon surety required in the county without a *supplicavit* sued, then the form of the writ of *certiorari* is such:

The king to the keepers of his peace in the county of L. and to every one of them greeting. We willing for certain causes

to be certified of the tenor of a certain security of the peace before R. B. and his companions, keepers of our peace, and our justices assigned to hear and determine divers felonies, trespasses and misdemeanors in the county of L. of R. of W. for that he shall not do, nor procure to be done any damage or evil to B. of F. or to any of our people, which security, of your office taken, remains in your custody as it is said, we command you, that without delay you certify the same to us in our chancery, under your, or one of your seals, distinctly and openly, remitting to us this writ.

And when the writ of *supplicavit* is directed only to the sheriff, then the *certiorari* shall be directed unto the sheriff only, to make return of the security found, if he have taken any security, &c.

Ant. 80.
 Poff. 82.
 Vid. 12 H. 7.
 17. by Fineux,
 by the common
 law the sheriff is
 conservator pacis.
 Vid. Lamb. 110,
 11. and now by
 the statute of
 33 H. 8. cap.
 39. it is clear
 that bond shall
 not be taken.

And if a man find sureties to keep the peace against certain persons before the sheriff, without any writ of *supplicavit* sued by him who requireth surety, and without the writ of ancient form used; then the party who required the surety may have a *certiorari* unto the sheriff to certify the security taken by him into the chancery, &c. without making mention in the *certiorari* of any writ sued forth to cause the sheriff to take such security; and by that *certiorari* it seemeth, that the sheriff *ex officio* may cause the party to find surety to keep the peace, if any one pray the sheriff to have such surety, and that the sheriff bind them by recognizance, and that he certify the same into the chancery by the *certiorari*: for if he certify an obligation taken for security, that certificate cannot make the bond to be a thing upon record, and the party cannot be bounden unto the king but by matter of record, or unless he come into the court, and confess the same to be his deed, and pray to have the same enrolled. And it seemeth in reason that the law is such, because by the common law the sheriff is conservator of the peace, and hath the keeping and the custody of the county for the time that he is sheriff; and the same appeareth by his commission and letters patent which he hath, the words of which patent are such:

Rex, &c. Commisimus vobis custodiam, &c. and by that he takes his authority, which is a matter of record,

as the commission which was made to them who shall be justices of the peace, which commission, giveth them authority to hear, determine and enquire of all those things which are done against the peace. And by reason of that commission they have power to bind men by recognizance to keep the peace, upon complaint made unto them by any person; and yet there is not express authority given them by the commission to take that recognizance; but it followeth, that because they have authority to cause men to keep the peace, and to hear and determine offences against the peace, they have power to bind men by recognizance so to do; for every thing which they have done by virtue of their commission ought to be taken as a matter of record. And by the same reason the sheriff, because his patent is of record, and he is conservator of the peace in every place, every obligation which he taketh to keep the peace shall be in law taken for a recognizance, and especially when it is certified in the chancery by *certiorari*: but yet all the pleas that are holden before him in the county are not of record, nor pleas holden before him in the county by writ of *justicies* are not taken as matters of record; for these pleas are holden before him by reason of the courts which he hath by virtue of his office, as the county and hundred court, &c. But as to the leets and torns which are for the commonwealth, as for keeping the peace, these are courts of record, and by consequence for keeping the peace the sheriff is judge of record, and may take recognizance for the keeping of the peace *ex officio*; but if he so do, and take recognizance upon a writ of *supplicavit*, or other writ directed unto him to take sureties for keeping of the peace, it seemeth the stronger; but give credit to better reason, and therefore *quere* thereof.

[82]

Vide 7 H. 4.

34. ac.

Crompt. 125.

Bro. Leet 39.

Bro. Leet 29.

9 Ed. 4. 31.

*Writ de (a) Auxilio ad Filium suum Militem
faciend' vel ad Filiam maritand'*

THE form of the writ is such:

A

The king to the sheriff, &c. We command you that justly, &c. you cause A. to have reasonable aid of his knights and freeholders in your bailiwick to make his eldest son a knight, or to marry his eldest daughter, according to the form of the statute thereupon provided by the common council of our kingdom of England. Witness, &c.

And a man shall not have this writ before his son B hath accomplished the age of fifteen years, nor to marry his daughter before she be of the age of seven years, as appeareth by the statute of *West. 1. cap. 35.*

And he who holdeth his lands by a knight's fee, shall C pay twenty shillings unto the lord, to make his son a knight, or to marry his daughter, and no more.

And the tenant who hath lands of the yearly value of twenty pounds holden in socage, shall pay twenty shillings unto the lord to make his son a knight, or to marry his daughter.

And he who holdeth by half a knight's fee shall pay ten shillings, and he who holdeth lands in socage of the value of ten pounds by the year shall pay ten shillings. And so according unto the rate of the value of the socage land, and according unto the quantity of a knight's fee, he shall pay his aid, and that by the statute before-mentioned.

But this aid, to make the son a knight, or to marry his daughter, the lord was to have by the common law of his tenants, and the statute puts it only in certainty. And D the lord may distrain his tenants for this aid, and avow for the same if he will; and he need not to sue this writ unless he will. And this writ is directed unto the sheriff, E

(a) A tenant in Frankalmoign 8 Ed. 2. Mem. 23. pro Abbatisa de shall not pay aid. See Ret. Parl. Cadamo.

and

and he may sue an *alias* and a *pluries*, and an attachment against the sheriff, if he will not assist the lord to distrain his tenants for this aid.

F And the king's tenants in like manner shall pay aid unto the king to make his eldest son a knight, or to marry his eldest daughter, &c. *viz.* Every one who holdeth by a knight's fee twenty shillings, and he who holdeth by half a knight's fee ten shillings, and so according to that rate.

And in like manner every one who holdeth of the king in socage twenty pounds land shall pay twenty shillings to make his eldest son a knight, or to marry his eldest daughter. And he who holdeth ten pounds land in socage shall pay ten shillings, and that is appointed by the statute *de provisionibus*, Anno 25 Ed. 3. cap. 11. And the statute setteth the aid certain, because before the said statute, the king would distrain for more to make his son a knight, or to marry his daughter; but now the statute appointeth that the king shall have no more.

12 Car. 2. c. 24.

G And if the eldest son dieth before he cometh to the age of fifteen years, or before the lord hath levied the aid to make him knight, then the lord shall have aid for the younger son, to make him knight when he cometh to such age, and yet he is not *primogenitus filius*, as the writ doth suppose, but he is the *primogenitus* which is then alive, and that is sufficient, for he ought to be heir apparent. And so it is if the eldest daughter dieth before the lord hath levied aid of his tenants in order to marry her, then he may levy aid for the next eldest which is then living, after she is of the age of seven years.

H And by the statute the writ which shall be directed unto the sheriff to levy such aid for the lord, shall mention that the son is of the age of fifteen years; and if it be for the daughter, it shall mention she is of the age of seven years, otherwise the writ is not good. But that form is not in the Register, for it seemeth the Register was made before the statute of *West.* 1. and therefore the writ ought to be according as the statute ordaineth it.

And if the lord have aid to make his son knight, or to marry his daughter, and die before he hath paid the same,

T 3

then

[83]

See after 122.
G.

then the son or daughter shall have an action of debt against the father's executors for the money; and if the executors have no goods of the lord, then the daughter shall have an action of debt against the father's heir, for so much of the money as she wanteth of that which her father had levied to marry his daughter: and that is by the statute of *West. 1. cap. 35.* And he who holdeth by A grand serjeanty or petit serjeanty, shall not pay reasonable aid to make the son a knight or to marry the daughter, as it appeareth *M. 11 H. 4. 32. (a).*

And if the lord levy aid for the marriage of his daughter, B and afterwards marry her, then the daughter shall not have an action of debt against the father's executors for the money levied, &c. But if the daughter be not married in the life-time of the father, &c. by him, then the action doth lie. And so it seemeth, that if the son be not made knight in the life-time of the father, he shall have an action against the father's executors for the money levied to make him knight.

Writ de Scutagio habendo.

Vide Lit. 19 and
29.

TH E writ for escuage lieth where a man Q holdeth lands of the king by knights service, to which homage, fealty and escuage is appendant: and he who holdeth of any lord by such service, which lord holdeth over of the king by the like services, when the king goeth to war against the *Scots*, or against the *Welsh* in proper person, or by his lieutenant, then he who holdeth by knights service ought to go in person, or find a man to go for him, in the war with the king, or his deputy in that war, for forty days at his own cost; and if he do not go, or find a man so to do for him, then he shall pay for that default, and not doing his service, such sum of money as shall be assessed by parlia-

(a) Nor any other tenures but the justices, 10 H. 6. *Avowry*
chivalry and socage, agreed by all 267.

ment; for a knight's fee so much, and for half a knight's fee so much; and so in proportion. And then he who holdeth by a whole knight's fee shall pay so much for escuage, as the parliament doth assess that a whole knight's fee shall pay, if he hath not done the service; and he who holdeth by half a knight's fee shall pay according to that rate; and those who have done their services and gone in war, shall not pay any thing. And that sum of money is called escuage, *servitium scuti*.

Vide 16 Eliz.
Dyer 329.
that he who
holdeth by the
moiety of a
knight's fee,
holdeth by
knights service,
and so it shall be
intended, if it be
not found to the
contrary.

D And if a man holdeth of the king by knights service, and to go with him in his war, &c. then that lord shall have escuage of his tenants who hold of him by the like service; but the sum which he shall have and levy ought to be assessed by parliament (as afore is said) before he distrain for the same.

E And if a man hold of any lord, to guard his castle in time of war, or to blow a horn in time of invasion of enemies, this is knights service: but it seemeth, that such tenants shall not pay escuage, if they do not their services, but the lord shall distrain them for not doing their service, and shall have recompence for the same. So that none shall pay escuage, but only those who hold by such services, to go into the war, or to find a man to go, &c. *Tamen quære.*

Lit. 35.

F And if he who holdeth of the king by knights service to go with the king in war, do his service, &c. then he shall have a writ for him directed unto the sheriff, to have escuage of those who hold of him by the like service. And the form of the writ shall be such:

The king to the sheriff, &c. Because our beloved and faithful W. D. did his service with us by our command, in our army of Scotland, in the first year of our reign. Or thus; Was with us by our command in our army, &c. in the first year, &c. as appears to us by the rolls of A. our constable of our army aforesaid. Or thus; Hath made fine with us for his service in our army of Scotland, in the first year, &c. as appears to us by the certificate of our treasurer and barons of our exchequer sent by our command into our chancery: We command you, that you cause the said W. D. to have his es-

cuage of the knights fees, which they then held of him in your bailiwick, to wit, eight shillings each shield for the army aforesaid; and this you in no wise omit. *Witness, &c.*

And by that it appeareth, that if the king's tenant go G with the king's lieutenant or his deputy in war, that the constable of the host ought to certify the same into the chancery before the king's tenant shall have a writ to levy the escuage of his tenants; and if the king's tenant do agree with the king for his going, &c. then the king ought to be certified thereof in the chancery by the treasurer and barons of the exchequer, before he shall have a writ to levy the escuage of his tenants.

And by that it appeareth, that if the king's tenant do H not go to war with the king, nor agree with the king for going, that then he shall not have escuage of the tenants, nor distrain the tenants for the same.

And if a man holdeth of the king by socage, and others I hold of him by knights service, and the king goeth to war in person into *Scotland* or *Wales*; now it seemeth he shall not have escuage of his tenants, if he goeth not with the king; but if he goeth with the king or his deputy, or agreeth with the king, then it seemeth he shall have escuage of his tenants, and shall have the aforesaid writ. And it is not material, whether he hold by knights service or in socage.

And if there be lord, mesne and tenant, and each hold K of the other by knights service, if the tenant go into *Scotland* by the king's common summons, then the mesne shall not pay escuage: *Quod conceditur per Cur', Trin. 6 H. 3.*

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Vide Title
Avowry 215.
See before 83.
E.

And if a man holdeth lands by such service, that he A shall pay a penny, or a pair of spurs, when escuage runneth, &c. the same shall not properly be escuage, as it appeareth in 15 *Ed. 2.* Title *Avowry* in the abridgments. *Lit. 26.*

And vide 19 *R. 2.* that garder of a castle doth coun- B tervail escuage, so that his heir shall be therefore in ward, and so of grand serjeanty; and yet it seemeth they shall not pay escuage. *Quod vide* in title *Gard, ibid. 24. 36.*

And

C And in title *Quare impedit*, in the abridgments, that escuage certain doth not make knights service. *Hil. 5 Ed. 3.*

D And if there be lord, and many several mesnes and tenants, and each hold by several knights service, if the tenant paravail of the land do the services, and go with the king in war, &c. the same shall excuse all the other mesnes; for for one land but one service can be demanded, viz. to go, or to find a man to go, &c. and so the mesne paramount to him is excused, because the service is done by the tenant, &c.

E And when the king will levy escuage of his tenants, he useth to grant a commission to certain persons. And the form of the commission is such :

The king to his beloved, &c. We have assigned you to levy and collect our escuage of our army of Scotland, in the first year of our reign, in the county of K. as well within liberties as without, of the fees of the knights which they then held of us in chief, or of the escheats and honours then being in our hand, or of the purchase of our ancestors or of us, as of the knights fees which are holden of archbishopricks, bishopricks, abbies, priories, or other dignities or offices ecclesiastical whatsoever which were then in our hand, and of the inheritances of heirs within age, and being in our custody; to wit, forty shillings of every fee for the army aforesaid; so that you may have all the monies thence coming, with all particulars, at our exchequer as soon as you can, to be paid to us there. And because many of the fees aforesaid have come to the hands of divers persons, as well in the times of our ancestors as in ours, to wit, some by hereditary descent, as well in parcels as in other manner, and some by alienations thereof diversely made, we assign you to inquire by the oath of honest and lawful men of every hundred in the county aforesaid, as well of knights girt with a sword as of others, by whom the truth of the matter may be better known, who held knights fees, or any part of the same fees in the same county in the time aforesaid, as of our crown of England, or of the purchase of our ancestors and us, and of the archbishopricks, bishopricks, abbies, priories, and other dignities and offices before said, and also of the inheritances of the heirs aforesaid, then being within age, and how many fees,
and

and what parts of a fee, every such tenant then held, and in what towns distinctly, and who were ancestors of them who held by hereditary descent, and who in other manner, and who also were the heirs within age and in our custody, and what archbishopricks, bishopricks, abbies and priories, and other dignities whatsoever or offices (the keeping of the temporals whereof belongs to us) were vacant at that time. And thereupon we command you, by the faith wherein you are bound to us, firmly injoining that at certain days, &c. you do and fulfil the premisses in manner aforesaid, and the inquisitions upon the premisses distinctly and openly made, which may make plain mention of every fee, and of the names and surnames of the tenants some time severally holding them, while they were held whole, and of those who afterwards successively held them after partitions of the same between heirs parceners, or by alienations, as is aforesaid, have at the exchequer aforesaid, about the feast of Easter next coming, under your seals and the seals of those by whom they were made. We also command our sheriff of the county aforesaid, that at certain, &c. he cause to come, &c. so many and such honest and lawful men, as well knights girt with the sword, as others of his bailiwick, as well within liberties as without, by whom the truth of the matter may be better inquired and known, and that he do obey and attend upon you in the premisses: we also command the treasurer and barons of the exchequer aforesaid, that they speedily send to you in writing such fees as are found at the exchequer aforesaid touching the lands and tenements in the county aforesaid, for evidence and for the greater expedition of the premisses: in testimony whereof, &c. Witness, &c.

19 Ed. 2. Br.
Tenures 68.
Lessee for life
may do escuage.
6 Ed. 2. Gard.
12. he shall have
the ward, be-
cause it is a pro-
fi; he shall
have escuage, be-
cause it is a suit
real; by Wilbie.
Scrope cont.

And a *venire facias* shall be sent unto the sheriff close upon this commission, and another writ close unto the treasurer and barons, &c. *quod foeda mittant*, &c.

And now it appeareth by this commission, that the king shall have escuage of the tenants who hold of these lands or manors which the king hath in his hands by reason of ward, or by reason of the vacancy of a bishoprick, &c. Or if he have an estate for years in the feignory, he shall have escuage of the tenants, &c.

And so shall another lord have, if he have a term for years or for life in the feignory, if he go with
the

the king in war into *Scotland*, &c. he shall have escuage then of the tenants which hold of him by knights service; for the tenant is not bound to go, but to defend his lord, or to find a man to defend him; and then if the lord do not go into the war, the tenant is excused.

Writ de Securitate inveniend' quod se non divertat ad Partes externas, sine Licentia Regis. [85]

A BY the common law every man may go out of the realm (a) to merchandize, or to travel, or for what other cause he pleaseth, without the king's leave; and he shall not be punished for so doing; but because that every man is bound to defend (a) the king and his realm, therefore the king at his pleasure by his writ may command a man, that he go not beyond the seas, or out of the realm, without licence; and if he do the contrary, he shall be punished for disobeying the king's command. And it seemeth that this command may be made by the king's writ under the great seal, and also by the privy seal, or signet; for by the law the subject is bounden to take notice of every of the king's seals in such case, as well as of the great seal.

Vide 1 Eliz.
Dyer 165.

2 Co. 17. b.

This writ is lex
terrae.
2 Inst. 54.

B And there are two manners or forms of such writs; one is directed unto the party (*), and the other unto the

(a) See *Dyer* 189. If one beyond sea does not return at the king's command under the great or privy seal, his lands and goods shall be seized for the contempt. And see the like in *Dyer* 176. where a baron had licence to go beyond sea, to be void on a condition which is afterwards broken. On a *mandamus* to return by letters under the privy seal, and a refusal certified by the messenger into chancery, and the certificate sent by *mittimus* into the exchequer, a commission shall issue to seize his lands.

And *Note*; It is there held, 1. That the licence is not countermandable within the term. 2. That the certificate of the contempt is not traversable, because not triable *per Pays*. *Note* also; The king has only the profits of the lands, and therefore observe well the statute. 13 *Eliz.* c. 3. *Dyer* 375.

(*) It is now usually directed to the sheriff only. 1 *Px. Alm.* 159. *Cl. Tut.* 294.

sheriff,

sheriff, commanding him that he cause the party to find security that he do not go out of the realm without the king's licence. And the first is such :

The king to I. of B. greeting : Because we are given to understand, that you design to go privately into foreign parts, and intend to prosecute there many things prejudicial to us and to our crown, in contempt and prejudice of us, and contrary to our proclamations and inhibitions thereupon often made : We, willing to oppose such contempt and prejudice, strictly (b) forbid you, under the peril that may fall thereon, that in any wise you go not into foreign parts without our special licence, nor attempt or cause to be attempted any thing to be prosecuted there, which may in any manner be able to prevail to the prejudice of us or of our said crown, nor send any person there for that purpose. Witness, &c.

And also the king by his proclamation may inhibit his subjects, that they go not beyond the seas, or out of the (c) realm, without licence, and that without sending any writ or commandment unto his subject; for perhaps he cannot find his subject, or know where he is, and therefore the king's proclamation is sufficient in itself. And if the subject do contrary thereunto, it is a contempt, and for so doing he shall be fined to the king.

The other form of the writ directed unto the sheriff is such :

The king to the sheriff, &c. Because we are given to understand that A. B. clerk, purposeth to go over towards foreign parts to prosecute there many things prejudicial and hurtful to us and many of our people : We, willing to resist his malice in this behalf, command you, firmly enjoining that you cause the

(b) See several ancient prohibitions *De non transfretando*, &c. Rot. Claus. 10 H. 3. m. 27. dorso. Claus. 11 H. 3. m. 25. dorso. Claus. 2 Ed. 3. m. 5. dorso. *Et Nota* Claus. 3 Ed. 3. m. 36. dorso, *appo- nitur portus de Dover tantum.*

(c) See *Dyer* 165. & Rot. Claus. 25 Ed. 1. m. 25. dorso. *Lib. Parl.*

704. And note *Dyer* 296. accordant. But till such proclamation made or writ issued, it is no contempt for any person to go beyond sea, although he intends to live there out of his due obedience: for his purpose or intent is not triable. See the statute of 5 R. 2. c. 2. repealed by Stat. 4 Jac. 1. c. 1.

aforesaid A. B. to come corporally before you, and by what means you can compel him to find sufficient manucaptors who will bail him, under a certain penalty to be reasonably imposed on them by you, for which you will answer to us. Or thus; And him the said A. B. to find sufficient security, under the penalty of one hundred pounds, to be paid to our use, or every one of them in the penalty of, &c. that he (go not towards foreign parts without our special licence, nor presume to prosecute, or cause to be attempted to be prosecuted, any thing whatsoever there, which may be able to prevail to the contempt of us, or to the prejudice or damage of our people, nor send any person or persons there for that purpose. And if he shall refuse to do this before you, that then you do commit him the said A. to our next gaol, to be kept safely in the same until he will freely do so; and when you shall have so taken that security, you thereupon without delay distinctly and openly inform us thereof, or certify in our chancery under your seal, remitting to us this writ. Witness, &c.

E And this writ may be directed unto justices of the peace, or unto the sheriff, or unto both; and the form may be as the writ of *supplicavit*, which is directed unto the justices of the peace, and unto the sheriff, to cause him to find sureties, &c.

F And every one, upon a surmise made unto the chancellor, may sue forth this writ for the king (*); and then the party against whom it is sued may come into the chancery, and obtain licence by letters patent or by letters under the privy seal or privy signet; and the licences are good, although they be not under the great seal, because those letters will excuse his contempt. And such licences are called (b) passports. And now by the statute of 5 R. 2. c. 2. it is ordained, That no person

Repealed per
4 Jac. 1. c. 1.

(*) It is now granted in aid of the subject to help him to his just debts. *Pr. Reg.* 251. 3 *P. Wms.* 313. But in such case a sufficient ground must be laid for the suggestion that the defendant is going abroad, which must be verified by affidavit, and a sum certain must be likewise

sworn to. *Shearman v. Shearman*, 3 *Bro. Cb. Rep.* 370.

(b) See the statute of *Magna Charta*, c. 30. That the sea shall be open for merchants. *Rot. Parl.* 18 *Ed.* 3. nu. 10. 22 *Ed.* 3. nu. 8. 25 *Ed.* 3. nu. 22.

pass out of the realm without the king's leave, but those who are excepted in the statute, and therefore see the statute.

Writ of Trespass.

THERE are two manners of writs of trespass: one is vicountiel, and is directed unto the sheriff; and is not returnable, but shall be determined in the county before the sheriff; and in this writ it shall not be said *Quare vi & armis, &c.* but the form of the writ is such:

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The king to the sheriff of Lincolnshire, greeting: W. of B. hath complained unto us, that C. made an assault upon him the said W. at N. and beat, wounded and ill treated him, and other enormous things to him did, to the no small damage and grievance of him the said W. And therefore we command you, that you hear (c) that plaint, and afterwards justly cause him to be thereupon brought before you, that we may hear no more clamour thereupon for want of justice. Witness, &c.

And by this writ the sheriff shall hear and determine that trespass, &c. by inquest according to the common law; and this writ is in effect a commission unto him, and he may declare upon this writ unto his damage of twenty pounds, or more.

And another form of (d) writ for goods is such:

A

The king to the sheriff, &c. W. and B. executors of the will of C. have complained unto us, that E. and F. took and carried away goods and chattels which were of him the said C. to the value of, &c. found under the custody of them the said executors at N. and other enormous things to them did, to the hindering of the execution of the aforesaid testament: and therefore, &c. that we may hear no more, &c.

(c) And yet the sheriff is not judge, but the suitors, 6 Co. 11. yet see 21 H. 6. 35. False judgment was assigned, because the plaint was held before the under-sheriff, and not the

sheriff himself; and so *coram non iudice*.

(d) Note; The writ, if for live things, is *cepit & abduxit*; if for dead things, it is *cepit & asportavit*.

And

B And a man may sue other writs of trespass upon the case in the county before the sheriff; and the forms of the writs are such:

The king to the sheriff, &c. A. hath complained unto us, that whereas B. did deliver a hundred sheep of his to the aforesaid A. to stay or be kept for one year upon his land and pasture at N. under certain conditions, the aforesaid B. took and carried away those sheep, being there upon the land of him the said A. within the term aforesaid, without the licence and will of the same A. and other, &c. to the damage, &c. By which writ it appeareth, that he cannot take back the cattle again, if the plaintiff perform the conditions.

C If a man borrow a certain sum of money, and pawn goods for the same, and offer the money again unto the party, and pray that the pawn may be delivered back to him, and the other refuse to do it, he shall have an action of trespass upon the case in the county before the sheriff, to determine the matter, &c.

D If a man deliver unto another a bull, or oxen or (a) cows, to make profit of them for a certain time; if he, against the will of him to whom they were delivered, take them back again within the time, he shall have an action of trespass against him directed unto the sheriff, to determine that cause.

E If a man distrain kine which are with calf, and impound them against law for so long time that they cast their calves, then he shall have a special writ directed unto the

(a) Note; This special writ, *Quæstus est nobis A. quod cum B. viginti oves, &c. liberasset, &c. præd' B. sine licentia prædicti A. oves illas infra term' cepit & abduxit.* Register 92. For it is clear the bailor in such case cannot retake them within the term. 2 Ed. 4. 13. 17 Ed. 2. 22. 1 H. 7. 15. And yet if he or his donee takes them, the bailee shall not have a general writ of trespass; for then he ought to recover damages to the value of the beasts, against him who has the general interest, which is not

agreeable to reason. See 11 H. 4. 24. adjudged; but against a stranger the bailee shall have a general writ of trespass. See 11 H. 4. 17. 21 H. 7. 15. and shall recover damages to the value of the beasts, because he is chargeable to the bailor in detinue. But if after the taking the bailor releases to the trespassor, the action *vi & armis* remains as before; and yet on the matter shewn, he shall recover damages only for the compesturing, &c.

Sheriff,

sheriff, rehearsing the special matter, to end the same before the sheriff in the county.

And so if a man have a salt-pit by the sea-coasts, and F another erect a wall betwixt the sea and the salt-pit, if the other person throw down the wall, by which the sea-water overfloweth the salt-pit, he shall have a special writ directed unto the sheriff, to end the matter in the county.

And so for every manner of trespass done, a man may G (b) chuse to have such a writ directed unto the sheriff, to end the matter before him in the county, or to sue a writ unto the sheriff returnable in the common pleas or the king's bench.

Vid. 4 Ann.
c. 16.

And if the writ of trespass be returnable, then the writ H shall be of another form, for then these words *vi & armis* (a) shall be in the writ; and if it want those words, the writ shall abate, if they be not writs of trespass upon the case; which writs of trespass shall not have these words *Quare vi & armis* in the writ, although they are returnable in the common pleas or king's bench; and if they have the words *Quare vi & armis* in the writs, it shall be good cause to abate the writs. And the form of a writ returnable in the king's bench is such:

The king to the sheriff, &c. If A. shall make you secure, I &c. then put by gages and safe pledges B. that he be before us on the morrow of All Souls, wheresoever we shall then be in England. And if it be returnable in the common pleas, then thus: Before our justices at Westminster on the morrow of All Souls, to shew (b) wherefore with force and arms he made an assault upon him the said A. at N. and beat, wounded and ill treated him, so that his life was despaired of, and other enormous things to him did, to the great damage of him the said

(b) So that it seems in a *justicies* the sheriff may proceed, though the freehold comes in debate. 6 H. 4. 2.

(a) But the *causa causans*, or immediate cause and conveyance to an action on the case, may be laid *vi & armis*, 12 H. 4. 3. 8 R. 2. Action

sur le Case, 29 Ed. 3. 20. 16 Ed. 4. 7. otherwise if it were only for non-feasance, 43 Ed. 3. 39. See 2 Salk. 636.

(b) Note; If the writ be, *Simul cum aliis malefactorib' vi & armis, &c.* it shall abate; otherwise if it be *Simul cum aliis ignot'*. 8 H. 5. 5.

A. and (c) against our peace: and have there the names of the pledges and this writ. *Witness, &c.*

K And if a man imprison another, then the form of the writ of trespass is, *To shew wherefore with force and arms he made an assault upon him the said A. at N. and (d) wounded, imprisoned and ill treated him, and other, &c.*

And it is not material whether he be wounded or not, for the form of the writ is such; but the damages shall be increased for the same, if he recover. And if he imprison him until he pay a fine for his deliverance, then the form is, *Wherefore with force and arms he took, imprisoned and ill treated him the said A. at N. and detained him in prison there (e) until he had made a fine (for so much) with the said B. for the having of his delivery, and other enormous things to him did, &c.*

L And a man may have one writ of trespass for divers trespasses (f), &c. as for breaking his close, cutting his trees, 2 H. 4. 13. 7 Ed. 6. Dyer 70. 20 Ed. 3. 38. per Thorpe. 22 H. 6. 59.

(c) *Note*; If he counts of a trespass done, part in another king's time, and part in the present king's time, the writ shall be, *Contra pacem nup' dom' regis, &c. Et dom' regis nunc, &c.* and it shall be good *reddendo singula singulis*. 21 H. 4. 15. And on a writ *contra pacem nostram* only, he shall not recover damages for a trespass done in the time of another king. See 2 Salk. 640.

(d) *Note* well; A justification for a battery is no justification for wounding, &c. 21 H. 6. 27.

(e) And if he justifies the imprisonment, he need not answer to the taking of the fine, for it is but accessory; and therefore the plaintiff ought to answer to the justification of the imprisonment, and not the taking of the fine. *Quære* 19 Ed. 3. 19.

Note; If one be taken in the county of G. and imprisoned till he makes fine in the county of W. he may have this writ in the county of G. 38 Ed. 3. 29.

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(f) Yet for taking of a hawk (reclaimed) he shall not have trespass, but trover and conversion. *Quære* 2 Lev. 201. 1 Salk. 667, &c. and the count ought to be that he is reclaimed; and it is not sufficient to say he was possessed of him as of his proper goods. Dyer 306. Trespass *de bonis asportatis* ought to alledge them to be *suis*. 13 H. 4. 11.

Note; In such a writ the defendant pleads, That as to a pheasant, he found it in his own ground, out of the plaintiff's warren, and he let his falcon flie at it, who followed it into the warren, &c. and the defendant followed his hawk thither and took it; and it was ruled in a manner by *Knivet*, That the entring and taking there was tortious. 38 Ed. 3. 10. Otherwise if the killing and taking had not been in the warren. 12 H. 8. 10. *Ld. Raym.* 250. See in trespass *Quære vi & armis in warrenam suam intravit*. It is no plea in bar that the freehold of the soil is in the de-

U

trees, fishing in his ponds, beating his servants, and taking his goods and chattels, and all in one writ; and for cutting his wood, and for taking his young hawks; and the form of the writ is, *Wherefore with force and arms he entered the wood of him the said A. at N. and took and carried away three young ones of his hawks of such a price, lately building nests in the same wood; and other enormous things, &c.*

And by this writ it appeareth that the property of the hawks are in him who hath the land by the word (*suorum*) in the writ. *Post. 89. E.*

[87]

34 H. 6. 38.
38 Ed. 3. 10.

And for hunting in a warren the form is, *wherefore he entered the warren of him the said A. at N. and therein, without his licence and will, chased, and took and carried away (a)* M

defendant. See 3 H. 6. 13. 5 H. 7. 10. 17 Ed. 4. 6. 10 H. 7. 25. 11 H. 6. 34. *contra.*

Note this diversity. 1. If one comes into a chase, forest or warren, and drive the beasts out of it, and he who drives out the beasts, or any other who has notice of it kills the beasts, the owner of the forest, or his officer may make fresh pursuit, and thereon take or seize the dead beast; for so long as he that killed it, had notice, &c. the legal and local property on the fresh pursuit shall be said to continue. 12 H. 8. 10. adjudged. 2. If a beast of forest, chase, &c. comes by escape into my land, I may kill him on my own ground without forestalling him, and the same is not punishable. 12 H. 8. 12. 21 H. 7. 30. provided it be not an hart proclaimed. 7 H. 6. 36. 3. If beasts of chase come by escape into my land, which is a convenient distance from the park, I may chase them with greyhounds; and if the greyhounds follow them towards the park, and I keep them out, and the greyhounds kill them, I may now take them, and am not punishable; otherwise if the

lands are not a convenient distance. 18 H. 6. 22. 43 Ed. 3. 8.

Note; In trespass for entering into a park, warren, &c. it is no plea to say it is no park or warren, but he must plead *non cul'*, and give the matter in evidence. 10 H. 6. 16. 19 H. 8. 9. and therefore it is held clearly, that if one has a warren, if he inclose or impark without the king's licence, and another hunt there, and he bring trespass *de parco fracto*, the other may plead *non cul'*, and give this matter in evidence; for none may have a park without the king's grant, or by prescription. *Note* also; The plaintiff in this writ does not make any title to the park in his count, and therefore it is no plea, that he had no park by prescription or licence. For how can judgment be given on a title where none is alledged. 18 H. 6. 21.

(a) *Note*; He shall not say *lepores suos*, for he has not the real property in them, but only a property *causa warrenæ*, and only during the time they are in the warren. 3 H. 6. 55.

hares,

hares, conies, pheasants and partridges, (b) &c. Post. 89, K.

A And if a man hunt and take away another man's conies in his close which is no warren, then the form of the writ is, *Wherefore, &c. he broke the close of him the said A. at N. and therein without his licence and will, chased, and took and carried away so many conies, (c) of such a price, &c.*

43 Ed. 3. 13.
Bro. Prop. 11 y
37.

And by this writ it appeareth, that he who hath the land hath no property in the conies. And so of a park; *wherefore &c. (a) he broke the park of him the said A. at N. and in it, &c. chased, and took and carried away the wild beasts. Or thus; Wherefore, &c. the herbage of him the said A. at N. lately growing, or the corn of him the said A. at N. lately growing, to the value of ten pounds, with certain cattle he depastured, (b) trod down and consumed, and other, &c. And he need not say in the writ, wherefore he broke the close, &c. and the herbage, &c.*

3 H. 6. 55. ac.
5 H. 5. 2.
22 H. 6. 59.

B And there is another form of writ of trespass, *of digging*
C *the soil and carrying away the sea coal.* And another form of writ in the register, *of his horse and cattle arrested without cause, until he should make a fine.*

D And another form, *of his house broken and timber carried away.*

E And there is a writ of trespass for executors for goods taken out of their possession, which is such:

(b) And he shall shew in his count the certain quantity (or number) of the things, but he shall not say *pretio* (or of what value.) *Quære* 30 Ed. 3. 10. for it is only (*fugavit*) in this writ.

(c) *Note*; He shall not have trespass for the conies only. 43 Ed. 3. 24.

(a) *Note*; The defendant ought to answer to the breaking of the park; as also to the driving or chasing. 20 H. 6. 37. *West. 1. c. 20.* and the plaintiff shall recover for the entering into the park, tho' the defendant does not hunt, if he came for that or other ill purpose. 5 H. 5. 1.

Note; The plaintiff shall not have judgment according to the statute, if he does not bring a special writ according to the statute, and not a general writ. 9 H. 6. 2. 47 Ed. 3. 10. adjudged.

(b) And *Note*; He has only a local property, and it is void without a special custom to the contrary. If beasts of chase or forest go out of the bounds of the forest, he in whose lands they are may kill them, except a hart proclaimed. 7 H. 6. 36. 21 H. 7. 30. 43 Ed. 3. 8.

The king &c. If A. and B. executors of the testament of C. shall make you secure, &c. then put, &c. wherefore he took and carried away four oxen, which were his the said C.'s, of the price of one hundred shillings, found in the custody of them the said executors at N. and mowed the corn of him the said C. there growing, and took and carried away the same corn, and other goods and chattels of the same C. found there in the custody of the same executors, and other enormous things to them did, to the delaying of the execution of the will aforesaid, and against our peace.

And if an abbot and his monks break the seal of any writing which they have made to another person, the party shall have a writ of trespass against them in such form:

The king, &c. If A. shall make you secure, &c. then put the abbot of C. and I. and D. co-monks of the same abbot, &c. wherefore, &c. a certain writing of him the said A. sealed with the common seal of the aforesaid house, by which the same abbot and convent were bound to the aforesaid A. to find her in victuals and cloathing and in all her necessaries, until the same abbot and convent should marry her the said A. to some man having twenty pounds of land or rent, found at I. they maliciously destroyed, and other, &c.

And also a man may have a writ of trespass for fishing in his several piscary, and for cutting his grass, and for plowing his land, or for shearing his sheep, and all in one writ.

And another form of writ for mowing his corn, and cutting his grass, and felling his woods, and eating his corn and pastures, and all in one writ.

And also another writ of trespass done unto a woman before (c) coverture, which is such:

If A. and B. his wife shall make you secure, &c. then put &c. wherefore, &c. he broke a certain chest of her the said B. found at N. and took and carried away a certain writing obligatory found in the same chest, &c. and other, &c. to the great damage of them the said A. and B. and against our peace.

(c) Note; This writ does not suppose a *dum sola*, but the count does, 21 H. 6. 30. 7 H. 7. 2. Dyer 105. before the coverture, the bill or writ shall be *dum sola*. See 22 Aff. 87. and the verdict may find all guilty, where one only beats, &c.

I And another writ in the register, of taking away a ship, and carrying away the chattels.

K And another writ, of corn and grass of vineyards depastured, &c. And another writ, of corn and grass of coppices depastured, &c.

L And another writ, of a pool broken, thus; *Wherefore, &c. he maliciously broke a certain pool at R. by which the water running from the same pool overflowed the fish-pond of him the said A. insomuch, that by the course of that water and the inundation aforesaid, the fish then being in the same fish-pond to the value of one hundred marks, issued thereout; and other, &c.*

By which it appeareth, that he shall have a writ of trespass *vi & armis*, because he causeth the water to run out of his pond, by which the fish there go away.

M And there is another writ, *de equis abductis*, and goods and chattels unto the value of five pounds and one hundred shillings of his money in monies numbered, *ibidem invent' capt. &c.*

N And there is another writ of trespass against those who lie near the plaintiff's house, and will not suffer his servants to go into the house, nor the servants who are in the house to come out thereof; and for taking and impounding his cattle, and not suffering him to sue a replevin, &c. And the form of the writ is such:

The king, &c. If, &c. put, &c. wherefore with force and arms they beset the house of him the said A. at H. and his men and servants, being out of the said house, would not permit to enter the same house to do therein for the service and profit of him the said A. and certain others his men and servants, being therein, would not permit to go out of the same house to the land of him the said A. there to till it by which one hundred acres of land of him the said A. remained untilled, and the same A. for a long time hath lost the profits of his land aforesaid, to the value of twenty pounds, and his service of the same men and servants; and also impounded there the beasts of him the said A. and detained them there impounded, not permitting them to be replevied to the same A. according to the law and custom of our kingdom; and other enormous things to him did, &c.

[88]

A And there is another writ of an house broke, and prisoner taken away thus:

U 3

Wherefore

Wherefore with force and arms they broke the house of him the said A. at N. in which the same A. (a) detained one H. of C. a Scot, taken by him in war as his prisoner, until he should be satisfied of one hundred pounds, for which the same H. made his ransom with the aforesaid A. for saving his life, and took and carried away him the said H. and other enormous things, &c.

2 & 3 P. & Ma.
Dyer 121.

And note, that the form of the writ for a live thing, as horses or men, or such like, is to say, *ceperunt & abduxerunt*; and for a dead thing, to say, *ceperunt & asportaverunt*, &c.

And there is another writ of trespass; if a man take another and imprison him until he make oath that he will not trouble nor imprison him for a trespass done to him before, or imprison him until he hath made unto him a release of all actions.

Infra 89. D.

And if a man taketh his villain and puts him into the stocks, and others come and break the stocks, and let him out, he shall have an action of trespass, and the form is,

Reg 95. b.

Wherefore when he the said R. took S. his villain and fugitive in his manor at K. and there put him in the stocks to punish him, as it was lawful for him to do, because he was not justifiable to him the said R. the aforesaid, &c. with force and arms broke the stocks aforesaid, and took and led away him the said S.

Post. 89. M.

There is another form of writ, thus: *Wherefore with force and arms, &c. he filled a certain ditch in L. with earth and mud so that the water issuing from the ditch aforesaid overflowed the corn of him the said W. being in sheaves in his barn there, by which his corn aforesaid, to the value of one hundred shillings, was rotted, and plucked up by the roots his trees there lately growing, to the value of forty shillings, and with certain beasts depastured, trod down and consumed his corn there lately growing, to the value of forty shillings, &c.*

(a) Note; If this writ be *bona & catalla*, he may not count of one live thing, as a horse, &c. but ought to have a special writ, 10 H. 6. 22. yet shall not abate for variance of the count; per Paston. See 21 H. 6. 29. If the writ be *bona & catalla*, and he counts of pikes or tenches, horses or

cows, the writ shall abate, for they shall be intended living: therefore the writ for these ought to be special, viz. *equos, vaccas, &c.*

Note; Where the writ was *de bonis & catallis*, it concluded *ad valenciam*; as 3 Ed. quos pretii, &c. 21 H. 6. 39. Dyer 121.

And

And what is in the first part of this writ it appears, is an action of trespass upon the case, and the residue a common action of trespass.

F And if a man draw wine out of the vessels, and put water in the same to fill them up again, he shall have an action of trespass in this form :

Wherefore with force and arms, &c. he drew out sixty flagons of a certain tun of wine of him the said A. of the price of four pounds, put in the ship of the aforesaid I. at S. to be brought from thence to S. and filled up that tun with sea water, so that the residue of the wine aforesaid became corrupted, and wholly perished; and other, &c.

G And another writ for fishing in his piscary, depasturing grass, and digging in his land, thus :

3 H. 4. 12. b.
& infra H.

Wherefore with force, &c. he fished in the free fishery of him the said A. at N. and cut down his grass there lately growing, and likewise dug in his land there, and took and carried away the earth there cast up, and the aforesaid grass and the fish (a) of the fishery aforesaid, to the value of one hundred shillings, &c.

H (b) And it appeareth here, that there are divers manners of forms of fishing in his fish-pool : one writ is, *wherefore, &c. he fished in his fisheries, &c.* Another writ is, *wherefore, &c. he fished in the several fishery of him the said A. &c.* And the third writ is as before, *wherefore he fished in the free fishery of him the said A. at N. &c.*

7 H. 7. 13.
supra G.

I And a man shall have a writ of trespass for breaking his house, and cutting his trees, and for fishing in his ponds, and for taking his goods and chattels, and for taking his beasts of the plough and impounding them, and for taking his doves out of his dove-house ; and the form is such :

Supra 87. G.
39 Ed. 3 20.

(a) Though the writ be *piscem*, he may count of more fishes ; for the word *piscis* is *nomen collectivum*. 4 H. 6. 11.

(b) Note ; In trespass for fishing in his several fishery, *liberum tenementum* is a good plea, but he cannot conclude judgment *si actio* without title shewn. For in trespass the thing itself is not in demand, as it is in assise or *quod permittat*. 24 H. 6. 43. 20 H.

6. 40. See 17 Ed. 4. 6. 18 Ed. 4. 4. 10 H. 7. 24, 27. and yet he cannot have a several piscary in another's soil, as well as a free piscary by a special title. 7 H. 7. 13. 20 H. 6. 4.

Also Note, That he who has *liberam piscariam* may have trespass against a stranger ; for he has more than common of piscary. 17 Ed. 4. 7. 7 H. 7. 13. Vide *Smith v. Kemp*. 2 Salk. 637.

U 4

Wherefore,

Wherefore, &c. he broke the houses of him the said A. at N. and cut down his trees there lately growing, and fished in his fish ponds there, and took and carried away the fish thereof and the trees aforesaid, and there took and impounded his beasts of the plough, and detained them so long time impounded, that forty acres of land of the same A. for a great while remained untilled, and took and carried away the doves of his dove-cote there, with nets and other engines, whereby the same A. wholly lost a flight of his dove-cote; and other, &c.

C. 5. part 108.
in trespass the
defendant as
to one thing
justified, and
pleaded not
guilty to ano-
ther, and the
jury found
one issue, and
taxed dama-
ges intirely.
22 Eliz.
Dyer 369.
2 & 3 Ma.
Dyer 221.
17 Ed. 3. ac.

And by this writ it (a) appeareth, that a man shall have an action of trespass for taking his beasts of the plough and shall join the same in a common action of trespass with other trespasses; and also that he shall have an action for taking his doves.

And a man may have a writ, *of his close broke, and of his K corn in sheaves, and hay, to the value of one hundred shillings, eaten up, &c. or of eating his hay only, &c. Or, wherefore he mowed down and carried away the reeds of him the said R. to the value of one hundred shillings, at N. lately growing.*

Another, *wherefore, &c. he broke the mill-stone of him L the said prior, of the price of forty shillings, at N. and the goods and chattels, &c.*

And by this it appeareth, that if it be a live thing or M dead thing for which the action is brought, it is not material whether he say, *of the price, &c. or to the value, &c. (b)*

And another writ of a mill-pool broken in two towns, thus :

(a) See *per Hankf.* If a writ of trespass be *ad valenc'*, &c. the plaintiff shall recover the value of the goods, and the jury shall be charged to inquire of the value; and therefore it is a good plea to say that the plaintiff is possessed of the beasts; for the writ ought to be, that the defendant had taken and detained his beasts *sine causa rationabili, per Hankf. sed Culp' contr'* and that it shall be given in evidence, that the plaintiff is seised of the goods in mitigation of the damages, 11 H. 4. 24, 25. and agreeing with this opinion of *Culp.* that the plaintiff

shall have a general writ, and that it shall not abate, but the matter be given in evidence. See 1 H. 6. 7. 12 H. 6. 6. 19 H. 6. 34. 21 H. 6. 15. 7 H. 6. 27. *Trespass quare quinque boves apud D. cepit & fugavit & imparcavit, &c. per quod tres de bo-vib' pretii 5 l. fame interierunt, & alii deteriorati sunt ad dampnum, &c.* and it was abated, because the value of all the beasts was not shewn; *contra* if it had been *fugavit & imparcavit*, but not *cepit*. 1 H. 5. 3.

(b) See 2 H. 4. 11. *per Markham.*

Wherefore,

Wherefore, &c. he broke the mill-pool of him the said R. of B. at R. and S. by which the water of the same pool wholly run out, and he the said R. lost the profit of his mill aforesaid, to the value of one hundred shillings; and his goods and chattels, &c.

N And another writ, *Of houses and chattels burnt.*

O And another writ, *Of his sheep shorn and the wool carried away.*

And another for taking him and imprisoning him in one place, and thence carrying him to prison in another place, and there detaining him in prison.

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A And another writ for taking his sheep in one place, and impounding them in another place, until he paid a fine.

B And another writ for breaking his sluices, in such manner.

Wherefore, &c. they broke the sluice of the mill-pool of him the said abbot, and his park there at S. and in it, without licence, &c. and (a) his trees, &c. and in his several fishery, &c. and took the fish thereof and the trees aforesaid, to the value of one hundred shillings, and also the wild beasts of the said park.

C Another writ, *Wherefore with force and arms, &c. he broke the sluices of him the said A. beyond the ditch of N. for the safety of his lands at C. and cut the timber thereof, to the value of one hundred shillings, into small pieces, so that by such breaking, the lands and meadows of him the said A. were there overflowed, and the same A. wholly lost the profit of the lands and meadows aforesaid, to the value of 100s. and other, &c.*

D And another writ; If a man imprison his villain, and set him in the stocks for some offence, and another man set him at large, the lord shall have an action of trespass for breaking up the stocks, and for setting his villain at large.

Supra 88. D.

(a) See for justification in trespass *de arborib' suis*, 13 H. 7, 9. And note; if he justifies the cutting, he shall not answer the carrying away; for if he

did not cut them, the writ ought to be *quare bona & catalla cepit*. 33 H. 6. 12. Kelw. 114. 10 H. 4. 1. 5 H. 5. 8.

See 91. K.

And another writ: If a man be riding on the way, and E another man strike his horse, by which the rider falleth and is hurt; he who is thrown off his horse shall have trespass against the other.

And another writ for putting out another man's eye, F thus: *Wherefore with force and arms he thrust out the right eye of him the said W. at N. and other, &c.*

And the master of an hospital shall have an action of G trespass for taking goods in the time of his predecessor; and the form of the writ is such: *The king, &c. If W. of S. master of the hospital of Saint Michael of C. shall make you secure, &c. then put, &c. wherefore with force and arms he took and carried away the goods (b) and chattels of the aforesaid hospital, to the value of one hundred shillings, found at R. in the time of I. of C. lately master of the hospital aforesaid, predecessor of the aforesaid master.*

And the like writ for an abbot or prior, and in the end H of the writ he shall say, *To the prejudice of the house and church of him the said abbot.* And so it seemeth it shall be in the end of the writ for an hospital.

And another writ for an abbot, thus: *Wherefore with force and arms he broke the gates and houses of the house and church of him the said abbot at L. and with certain beasts depastured, trod down and consumed the corn of the house and church aforesaid, in the time of the abbot aforesaid, there growing, to the value, &c. and took, &c. the goods and chattels of the same house and church in the time aforesaid, to the value of one hundred shillings, there found; and other, &c. (c)*

And another writ for a trespass done in the time of va- I cation of an abbey or hospital; *Wherefore with force and arms he took and carried away the goods and chattels of the*

(b) Note *prædict' hospitalis*, but not *so de custod' & ecclesia*. 9 H. 6. 25. *vel præd' I.* or if the predecessor himself had brought the writ, it should be *bona & catalla ipsius I.* See accordant 18 Ed. 2. 3. 47 Ed. 3. 23. 9 Ed. 4. 33. and so of a replevin brought at common law. 16 Ed. 3.

Trespass 211. And so it is of waste *ad exhæredationem domus & ecclesiæ de B.* See 7 H. 6. 18.

(c) But when such trespass is done to the predecessor. See 13 Ed. 4. 16. 4 Ed. 4. 8. *contra* 2 H. 4. 4. the writ being *arbores domus & ecclesiæ de B.* See 18 Ed. 2. Trespass 237.

house

house and church of the abbot of C. (a) in the time of the vacation of the abbey aforesaid, to the value of one hundred shillings, found at L. &c. and other, &c. to the prejudice, &c. and against the peace, &c.

K And another writ of trespass; *Wherefore with force and arms he entered the warren of him the said A. at C. and chased in it, &c. and likewise entered his wood there, and three young ones of his hawks nestling in the same wood, of the price of twenty shillings, and other his goods and chattels, to the value of one hundred shillings, there found, and also hares, conies and partridges in the warren took, &c.* Ant. 86, 87.

L (b) And another writ of trespass; *Wherefore with force and arms he chased one hundred sheep of him the said A. found at T. with certain dogs, inciting those dogs to bite the sheep aforesaid, insomuch that by the chasing and biting of the dogs aforesaid the said sheep were greatly injured, and a great part of them cast their young, and made an assault upon T. his servant there, &c. by which, &c.*

And another writ, of swine chased, so that they died, &c.

And if a man incite or procure his dog to bite any man, he shall have an action of trespass for the same.

M And if a man fill a ditch with mud and earth, which had used to be a watercourse, by which another man's land is overflowed, &c. he shall have a writ of trespass; *where-with force and arms he filled a certain ditch at T. through which a certain water runs there, with earth and mud, insomuch that the water being hindered of its ancient course, overflowed twenty acres of land of him the said A. there sowed with divers kinds of grain, by which he the said A. wholly lost the profit of his land aforesaid; and other wrongs, &c.* Ant. 88.D.

N And if a man distrain cattle, and carry them into unknown places, the party shall have an action of trespass *quare vi & armis* for the distraining of them; and the writ is such:

(a) See when on a vacation by deposition, in the time of Ed. 1. *Trespass* 242. the bishop shall not punish trespass on the temporalities, but the king. 38 Ed. 3. 30. *Vide* accordant 39 Ed. 3. 19.

(b) If my dog kills your sheep, and I freshly after the fact tender you the dog, you are without remedy. 7 Ed. 3. Barr. 290.

Wherefore with force and arms he took the beasts of him the said A. at N. and chased them to places unknown, so that those beasts could not be found to be replevied to him the said A. according to the law and custom of our realm; and other, &c.

There are other writs of trespass founded upon statutes, some of which follow (c). O

3 E. 1. c. 13.

The king, &c. If A. &c. then attach B. &c. that he be before us, &c. to answer the aforesaid A. wherefore with force and arms he ravished C. the wife of the aforesaid A. at N. and carried her away, with the goods and chattels of the aforesaid A. to the value of one hundred marks, and yet detains her from him; and other, &c. to the great damage, &c. (d) against the form of the statute in such case provided, &c. Witness, &c.

Ant. 69. I.

Another writ; wherefore with force and arms he took the beasts of him the said A. at N. in your county, and chased them from that county into the county of Kent, and impounded and there detained them impounded, contrary to the law (a) and custom of our realm and against our peace; and have there, &c. P

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Another writ of trespass, (b) that distresses, &c. be not out of the fee, or in the king's way, thus: *If A. shall make* A

(c) *Note*; The action is to commence with an attachment, and not with a *pone per vadios*. 14 H. 6. 2. See the stat. of West. 2. c. 38.

(d) *Note*; The party shall not have the punishment enjoined by the stat. but where he is sued by a writ that makes mention of the statute. 9 H. 6. 2. *Vide infra A.*

(a) *Note*; This writ lies against a lord. 3 Ed. 3. 5. adjudged. But if A. holds an acre, &c. in one county of a manor in another county, the lord may distrain in the said acre, and carry the distress into the other county. 1 H. 6. 3. *per Cur.* 22 Ed. 4. 11. *Quare*, 18 H. 7. *Kelw.* 50. 14 Ed. 3. *Barr.* 275.

Note; In trespass for a distress taken and driven into another county against A. and B. A. pleads not guilty, and B. says that he is bailiff of J. S. of whom the plaintiff holds, &c. And for services arrear he distrained, and drove into another

place within the same county, without doing any thing against the peace and tenders to aver his plea. And resolved, 1. That the defendant here need not make an avowry, for he shall not make a return here, for the writ does not command the sheriff to make deliverance. 2. That the issue shall be tried in the county where the taking was, and not where the driving is supposed, for there they cannot take consance, whether they were the same beasts that were taken in the other county. *P.* 13 Ed. 3.

(b) But note; The party grieved shall not have advantage of the statute of Marl. c. 35. except by a special writ founded on the statute, and not by a general writ of trespass. 43 Ed. 3. 30. *Temp. Ed.* 1. *Avowry* 130. 11 R. 2. *Avowry* 87. 4 H. 6. 2. *per Bab. contr. Martyn*, 9 H. 6. 2 *Ratio* because in a special writ the party makes a fine to the king. 8 Co. *Beecher*.

you secure, &c. then put, &c. that he be, &c. before, &c. to shew wherefore, seeing that it is provided by the common council of our realm, that no one shall make distresses out of his fee for any cause whatsoever, neither in the (c) king's way nor common street, except those having special authority for this purpose of us and our ministers, the aforesaid B. who is not our minister, as it is said, out of his fee at N. the beasts of him the said A. contrary to the form of the provision aforesaid, &c. And have, &c. Otherwise in the highway, thus: The beasts or (d) goods and chattels of him the said A. in the king's way took and impounded, and yet (e) detains them impounded against the law and custom of our realm, &c. and against our peace. Or thus: and detained the beasts aforesaid a long time impounded, against the law, &c. and against our peace, &c. and have, &c. And in the mean time cause those beasts to be delivered to him the said A. Witness, &c.

B Another writ of trespass against him who distraineth a man by (f) his beasts of the plough, or by his sheep: to shew wherefore, seeing that it is appointed for the common profit of our realm, that no man of the same realm may be distrained by the beasts of his plough, or by his sheep, for our or another's debt, or on other occasion whatsoever, by our or another's bailiffs or ministers, so long as he hath other beasts by which reasonable distress may be made upon him for levying those debts, except only those beasts which being found doing damage to any one shall happen to be impounded according to the law and custom of our realm; the aforesaid W. (g) took and impounded the sheep of the aforesaid A. at N.

(c) One may distrain *in via regia* for an amercement in a leet. Temp. E. 1. *Avowry* 232. 19 Ed. 2. *ibid.* 221, 225.

(d) Without saying *pretii* in the writ, but it must be in the count. 19 Ed. 3. *Brief* 842. Note the reason, because they are taken *nomine districtionis*, and see there *contra pacem* omitted.

(e) See 39 Ed. 3. 20. *Detinuit quousque Finem fecit*, held good.

(f) See this writ lies where the rent is arrear. Temp. Ed. 1. *Avowry* 230.

(g) Note; The writ lies between lord and tenant, and although the tenant pays his rent and has deliverance, he shall have this writ. 18 Ed. 2. *Action sur stat.* 35. And note; if at the time he takes the distress, he cannot find other distress, but only sheep, &c. altho' he could (not) have distrained before the distress

N. or the beasts of him the said A. of his plough at N. against the form of the statute aforesaid, and yet detains them there impounded against the law and custom, &c. and against the peace, &c. And have, &c. And in the mean time cause those beasts to be delivered to him the said A. Witness, &c.

And so note, that in this writ of trespass the sheriff shall make deliverance unto the party, as he shall do upon a replevin: and if the party hath the beasts delivered unto him before the writ sued, then this clause, *cause those beasts in the mean time to be delivered to him the said A.* shall not be in the writ.

Another writ: if a man take the oxen or carts of another, or other things, as barges or ships to carry goods, against the will of the owner, then he shall have such writ: C

The king to the sheriff, &c. If, &c. put, &c. to shew wherefore, seeing that in the statute lately made at Westminster, amongst other things it is contained, that none take horses, oxen, wains, carts, ships and boats for carriage, against the will of him whose goods they are, the aforesaid B. and D. with force and arms took, and for a long time detained, a certain cart and four horses for carriage of the aforesaid A. found at N. against the will of him the said A. and other wrongs, &c. to the great damage, &c. and contrary to the form of the statute aforesaid, and against our peace: and have there, &c.

Executors shall have such writ of trespass for goods and chattels taken in the life of the testator. D

And if a man distrain out of his fee, he who is distrained shall have an action of trespass against him; and in the end of the writ there shall be this clause, *and cause those beasts in the mean time to be delivered to him the said A. &c.* E
And by that writ the sheriff shall deliver the cattle to the party, as in a replevin.

distress is cognizable, (*viz.* if he hath a seignior, &c. and so cause to distrain) whereupon they were at issue, whether he could find sufficient distress on the tenements. 29 Ed. 3. 17. But note; The count may be

general as the writ is, *viz. contra formam statuti*, and need not alledge that *nulla alia rationabilis districtio inveniri potuit*, but that shall come on the other side, and it is supplied by the *contra formam statuti*. Dyer 312.

F If a man cast any thing upon the feet of another, by which he is hurt, he shall have an action of trespass for the same.

G If a man take a canon or monk out of the monastery, the abbot or prior shall have an action of trespass thereupon, thus:

Wherefore with force and arms he broke a certain house within the priory of B. which is a cell of the same abbot, wherein friar I. canon of the same abbot, was put for an offence against the rule of his order, into which he fell, to be chastised according to the rule of the said order, and took and led away the aforesaid I. and other, &c. Or thus: wherefore, &c. he broke the close of him the said abbot at L. and friar W. of L. canon, &c. who was detained in prison within the close aforesaid, to be chastised according to the rule of his order, drew out and led away from the same prison; and other, &c.

H (a) And a man shall have an action of trespass for taking his son and heir, or his daughter and heir, and marrying her; and the writ is such:

If R. shall make you secure, &c. then put, &c. W. and B. 12 H. 4. 16. that they be, &c. wherefore with force, &c. they ravished, married and led away John or Joan (as the case is) son or daughter and heir of the aforesaid R. found at I. and other, &c. (b).

I And the king shall have an action of trespass for taking his goods; and the writ is such:

Wherefore with force and arms our goods and chattels, to the value of, &c. and other injuries there committed, in contempt and to the great damage of us, &c. and against our peace.

(a) The declaration may be *de raptu custodiæ*, as well as *de raptu hæredis*. Palm. 75. *Banfield versus Hutchins*. Also it may be without saying *cujus maritadium ad ipsum pertinet*. 12 H. 4. 16. *contr.* 32 Ed. 3. *Gard.* 329.

See 21 H. 6. 15. the father commits his son of the age of one year to a nurse, and goes out of the country, and it is reported about the country that he is dead; and for that the in-

fant was ill kept, the uncle takes him, and retires to the father, when he shall not be punished for this taking. And *Note*; he is named heir in the life of the father. 31 Ed. 3. *Brev.* 327.

(b) And he shall recover the value of the marriage. 12 H. 4. 16. And *Note* 3 Co. 55. *Gray and Jefferies's case*. See 29 Aff. 35. 21 H. 6. 24. *Dyer* 304. *Post.* 140. F. 143. R.

And

And for such trespasss done upon the soil and possession of the king, the practice is to have an information of intrusion for the king in the exchequer, and the defendant there to answer it. And when he appeareth in the exchequer, the course is there to bind him in recognizance at his peril to leave the possession to the king; and yet it seemeth the king may have an action of trespasss, *wherefore he broke the close, &c. and depastured the herbage, &c. and cut the trees, &c.*

And there are other writs of trespasss, *wherefore they broke K the hedges and ditches of him the said A. &c.*

And another writ for digging in his land, and for putting lime and hemp in the ditches, by which the water is corrupted; and the writ is,

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Wherefore, &c. he digged in the several soil of him the said A. at N. and the earth cast from thence threw into his ditches there, and put lime and hemp in the same ditches, by which the water being in the ditches became so infected by the corruption of the lime and hemp aforesaid, that the fish in the same ditches to the value of, &c. died; and other, &c.

And another writ of trespasss for assaulting a man in his A house, and lying in wait for him, until he make oath that he will not bring any action against him, &c. and the writ is such:

Wherefore upon him the said I. &c. and pursued him the said I. into a certain house, to which he there fled for saving his life, and besieged him therein for a long time, and detained him so besieged until he made his corporal oath, that he would not move any action against him, &c. by reason of the trespasss aforesaid or for any other matter whatsoever, &c.

40 Ed. 3. 10.

And if a man have waif and stray within his manor by B prescription, and another man take any waifs or strays out of the manor, &c. he who hath the manor shall have an action of trespasss for them, &c. and that without any seizure of them before (a).

(a) See 43 Ed. 3. 8. 10 H. 6. 11. And Note Dyer 338. A waife happens in one franchise, and escapes into another franchise before seizure, the second lord shall have it, for the

property is not changed before the seizure, by the better opinion. 12 H. 8. 10. See 33 H. 8. Estray 11. 7 Ed. 4. 10.

C And if a man take another man and imprison him, and compel him to make to him a statute-merchant, or a release, or an acquittance, he shall have an action of trespass for the same, and the writ shall recite the matter, and the detaining of him in prison, *quousque*, &c.

D If a man have wreck by prescription, or by the king's (b) grant, &c. if goods be wrecked upon his lands, and another take them away, he who hath the wreck shall have an action of trespass, (c) *quare vi & armis*, for thus taking, without seizure thereof before; and the writ is such:

To shew wherefore, seeing that the said Th. is lord of the manor of Eston Bavent, and ought to have there, and he and his ancestors, lords of the manor aforesaid, from time out of mind hitherto have been accustomed to have wreck of the sea within the precinct of the manor aforesaid, the aforesaid Joice and Robert with force and arms took and carried away goods and chattels to the value of one hundred shillings, cast upon the land at S. within the precinct of the same manor, which ought to belong to him the said Th. as wreck, &c. Or thus: ten pounds in money, &c. Or, wherefore, seeing that by charter, &c. ought to have, &c.

E If a man send his servant to apprehend his villain, and to bring him unto him, and the servant apprehend the villain, and in bringing him unto his master another rescue him from the servant, and let him go at large; the master shall have an action of trespass for this rescous, and not the servant, for the wrong is done to the master, &c.

F If an abbot or other man have a hundred, and have goods of felons within the hundred, if any felon within the hundred be attainted, and the sheriff take the goods of the felon within the hundred, he who hath the hundred, and such liberty, shall have an action of trespass against the sheriff for the goods which the sheriff took, and the same shall be *quare vi & armis*, &c.

(b) That it is so in the king's case, it is an action on the case. 13 Ed. 3. see 14 Ed. 2. *Trespass* 326. *Brief* 647.

(c) See the like writ maintained without title made, and note there

(d) And if an abbot or other person ought to have toll **G** in any place, and he send his servant to take the toll, and another obstruct his servant in taking the toll; the abbot, or he who ought to have the toll, shall have a general action of trespass, *quare vi & armis* they assaulted his servant, and obstructed him in taking the toll. And the writ is such:

Wherefore, seeing that the same abbot, by the charters of our progenitors aforesaid, formerly kings of England, ought to have toll of things coming to the town of S. to be set to sale there, they the said R. and I. with force and arms made an assault upon S. the servant of him the said abbot, by him deputed to collect such toll in the town aforesaid, and hindered him, so that he could not collect and receive such toll, and took from the said S. certain chattels there taken and attached by him the said S. in the name of a distress for such toll, whereby the said abbot hath for a long time lost the profits coming of such toll; and other, &c.

And so if a man ought to have toll in a fair, &c. and his servants are disturbed in gathering the same, he shall have the like action for assault (a) of his servants, and for the loss of their service, and for the disturbance made unto them, and for losing the profit of his toll, and all in one writ.

Vide 1 H. 5. 1.
47 Ed. 3. 22.

Co. Litt.
200. b.

And if a man have a fold in common with two other **H** men, and one of them obstruct him in setting up his clays and pales, and break them, he shall have an action of trespass against him in this form, *quare vi & armis*, thus:

If the prioress of T. shall make you secure, &c. then put, &c. E. &c. to shew wherefore, seeing that the same prioress ought to have a certain fold at F. together with the aforesaid E. and M.

(d) But Note; In this case it seems, that the name of the buyer, as also of the thing sold, for which the toll is due, ought to be shewn in the county. *Quare*, 9 H. 6. 45.

(a) Note; Trespass for beating his servant, *per quod servitium amisit*, lies although he was not retained, but served only at will, 11 H. 4. 2. *per Hull* accordant. And so if A. retains

B. to be his servant, who departs into another county, and serves C. A. before any request or seizure, cannot beat B. and if he does, C. shall have trespass against him, 21 H. 6. 9. and recover damages, having regard to the loss of the service, 22 Aff. 76. and the retainer is traversable. 11 H. 6. 30.

of

of B. and she the said prioress and her predecessors from time out of mind always hitherto have been accustomed to have such fold with the aforesaid E. and M. and their ancestors; the aforesaid E. with force and arms broke the clays and pales of the said prioress in the fold of them the said prioress, E. and M. at the said town of F. lately erected and placed, and hindered her the said prioress, so that she could not put her clays and pales in the fold aforesaid, as she lawfully might, or receive any profit of the said fold; and other, &c.

I A man shall have an action of trespass for taking his apprentice, or for taking his servant. 21 H. 6. 31.

K (b) And the churchwardens shall have an action of trespass for taking the goods of the church, either in their own time, or in the time of their predecessors.

L (c) And a man may have an action of trespass for breaking his house or close, and alledge a continuance of the trespass, and the breaking thereof, from such a day unto such a day; as well as he may for treading his grafs or cutting his corn, &c. (a). 2 Ld Raym. 974. 2 Salk. 638. Bull. Ni. Pri. 86.

M The ordinary shall have an action of trespass for those goods which he hath to administer as ordinary: as where a man dieth intestate, and the goods are taken out of his possession, he shall have an action of trespass for the taking thereof. But he shall not have an action of trespass for goods taken

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(b) Note; They are the goods of the parishioners, and therefore in a *fi' fac'* against a parson *de bonis ecclesiasticis*, if the sheriff delivers the goods of the church in execution, trespass lies by the churchwardens. 8 H. 5. 4. But an action cannot inure to them in succession. Dyer 48. Str. 852. Wats. c. 39. An indictment for breaking the church, and taking the goods of the parishioners. Dyer 99.

(c) In trespass with a *continuando* from such a day to the day of suing the writ, the defendant says, that A. was seised and enfeoffed him, and that so he was seised, till the plaintiff by colour entered, upon whom he

the defendant entered; the plaintiff makes title that C. was seised and enfeoffed him, and that he was so seised, till he was disseised by the defendant, *absque hoc*, that A. enfeoffed him; and it was found for the plaintiff, and it was moved in arrest of judgment, that the plaintiff had abated his own writ; for seeing he had shewn that the defendant disseised him, and had not shewn any re-entry after such disseisin, he shall not have trespass with a *continuando*, but only for the entry, and so was the better opinion. 19 H. 6. 28.

(a) See trespass of corn (bles) taken with a *continuando*. 21 H. 6. 43.

out of the possession of him that died intestate, but the administrators shall have such action; for the ordinary shall not have an action for goods or debts of him that died intestate, but only an action of trespass for taking goods out of his own possession. And the process in this writ of trespass is an attachment and *distringas*; and if the sheriff at the attachment or *distringas* return *nihil*, then he shall have a *capias*, and *alias*, and *pluries*, and exigent, and so process of utlagary against him.

If the king grant a protection unto a man, by which protection he taketh him, his lands and goods, into his protection, as the common course and form of protections are; now if another man do afterwards take his goods, or enter into any of his lands or tenements during the time that the protection is in force, he shall have a special action of trespass against him in this form:

To shew wherefore, seeing that we lately took into our protection and defence W. his men, lands, goods, rents, and all his possessions, forbidding all and singular persons, to bring upon him or them injury, trouble, damage or grievance; the said B. with force and arms took and carried away the goods and chattels of the aforesaid W. while he was under our protection, found at N. to the value of one hundred pounds, and his men, &c. by which and other wrongs, &c. to the great damage of him the said W. and against our peace; and have there the names of the pledges and this writ. Witness, &c.

And he who hath the king's protection, if any take his goods, or enter into his lands, &c. or beat his servants, &c. he shall have a special writ unto the sheriff to inquire of them, and to certify the same before the king, &c. and it seemeth the king shall make process against them by *venire facias* as upon an indictment, and that thereupon they shall be fined; and the writ is such:

Infra C. contr.

The king to the sheriff of Lincolnshire, greeting: We command you, that by the oath of honest and lawful men of your county, by whom, &c. you diligently inquire what malefactors and disturbers of our peace with force and arms took and carried away the goods and chattels of A. to the value of one hundred pounds, found at N. (whom we took under our special defence,

defence, his men, goods, rents, and all his possessions, forbidding all and singular persons, to bring upon him or them injury, trouble, damage or grievance) and made an assault upon his men there being, and them beat, &c. and other wrongs, &c. to the great damage of him the said A. and against our protection aforesaid, and against our peace: and without delay send to us the inquisition thereof, distinctly and openly made, under your seal and the seals of those by whom the same was made, and this writ, &c.

But note, That there is a statute made *anno 28 Ed. 3. cap. 6.* that willeth, that no commission or writ shall be thenceforth granted unto the sheriff to inquire, &c. But if such writ or commission be granted, &c. *quare* if it be good; it seemeth not, for this statute is made purposely to bind the king, that he shall not grant, &c.

D There is another writ, *Of hay cut down in the meadow, and eaten up*; and another writ, *Of a close, doors, and windows broken*, &c.

Writ de Trespass sur le Case.

E THERE is another form (a) of writ of trespass upon the case, which is to be sued in the common pleas or king's bench; and in that writ he shall not say *vi & armis*, &c. but in the end of the writ he shall say *contra pacem*; and the form is as follows:

The king to the sheriff, &c. If Maud of D. &c. then put, &c. that he be, &c. to answer as well us as Maud, wherefore, seeing that the same Maud lately in our court obtained our certain writ of prohibition against the aforesaid I. that he should not prosecute any plea in the court christian touching chattels and debts, which do not concern testament or matrimony, and the same Maud delivered our said writ to the aforesaid I. at C. he the said I. having received our said writ there, cast it into the dirt and trod it under his feet, and also hath prosecuted the plea aforesaid in the same court christian, in contempt of us and

Note well this writ, that it lieth for casting a writ into the dirt.
Crompton
133. acc.

(a) See 7 Ed. 3. 2. 46 Ed. 3. 19. 31 Ed. 3.

to the great damage of the said Maud, and against our peace :
And have, &c. (b).

Another writ; *Wherefore he fixed piles across the water of Plim, along which, between the Humber and Gaunt, there is a common passage for ships and boats, whereby a certain ship, with thirty quarters of malt of him the said W. was sunk under water, and twenty quarters of the malt of the price of one hundred shillings perished; and other wrongs, &c.*

And if the lessor oust the executors of the lessee of their term, they shall have a special action of the case against the lessor, and the writ shall be by summons, &c. and not by *pone per vadios & salvos pleg'*, as the other writ of trespass is; and the form is as follows:

If Joan, executrix of the testament of E. of C. shall make you secure, &c. then summon, &c. P. and M. to shew wherefore, seeing that they the said P. and M. demised to the aforesaid E. of C. one mill and six acres of land, with the appurtenances in N. for a term which is not yet past, the aforesaid E. of C. in his testament devised the aforesaid mill and land until the end of the said term to the aforesaid executrix, to execute the testament aforesaid thereupon; the aforesaid P. and N. after the death of him the said E. of C. entered into the said mill and land (during the term aforesaid) and unjustly withheld the same from the said executrix, in delay of the execution of the testament aforesaid, as it is said: and have, &c.

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And if the sheriff arrest a man upon a *capias* directed unto him sued forth upon a statute-merchant, and afterwards set him at liberty, he who sued the writ shall have a special action upon the case against the sheriff, which is such:

The king to his coroners, greeting: If A. shall make you secure, &c. then put, &c. our sheriff of Suffolk, that he be, &c. to shew wherefore he permitted R. a merchant, lately taken

(b). Action on the case against one who had bought certain trusses of hay, and letting them lie and rot, &c. without carrying them away. 13 H. 4. *Action sur le Cafe* 48. So against one of whom another bought

goods which he had before stolen. 42 Aff. 8. So for not keeping of goods, &c. But if it was without the defendant's default, he shall be quit. 42 Aff. 9.

and

and being in custody of the same sheriff at O. by our writ directed to the said sheriff by virtue of a certain recognizance of one hundred marks made to the said A. by the aforesaid R. according to the form of the statute lately set forth at Acton Burnel, to go at large against the will of him the said A. the said A. not being satisfied of the said one hundred marks, to the great damage of him the said A. and in delay of the execution of the recognizance aforesaid, as it is said: and have, &c.

B And if the sheriff in a writ of account or debt return upon any, *That he is not found, nor hath lands, &c. by which (a) he could be distrained, &c.* for which a *capias* is awarded against him, and he arrested thereupon, where he hath sufficient lands, or goods and chattels; then he shall have an action upon the case against the sheriff, directed unto the coroners, as before is said, &c.

C And so another writ; If the sheriff have (b) a prisoner committed unto him for debt, &c. and he afterwards suffer him to go at liberty before the debt be satisfied, &c. he shall have an action upon the case against the sheriff; and yet it seems he may have an action of debt against the sheriff.

St. 1 R. 2. c. 12.
2 Bl. Rep. 1048.
2 Term. Rep.
K. B. 129.
2 Term. Rep.
K. B. 230.

D If a man be indicted of felony before any justice, and one T. as one of the four men of the town, and Reeve, give the evidence as indictors, &c. and afterwards he who is indicted be acquitted, &c. and afterwards the bailiff of the hundred or other officer shew unto T. that he who is acquitted hath a writ of conspiracy against him, and that he hath a *capias* to arrest him, by which he takes and imprisons him until he pay six marks for a fine for his deliverance, &c. he shall have an action of trespass upon his case: But it seemeth he may have a general action of trespass in that case upon false imprisonment, if he have not any writ directed unto him.

(a) See Rot. Claus. 26 Ed. 1. m. dorso.

(b) *Quære*, If he is not excused of an escape, when by the king's command. Stat. 1 R. 2. cap. 12. Dyer 161.

If a replevin be removed out of a franchise by *pone* into E the common pleas, and afterwards (pending the plea in the common pleas) the bailiff of the liberty award a return in the liberty to the defendant, for which he taketh the cattle and impoundeth them, by means whereof some of them die for want of food; the party grieved shall have an action upon the case against the bailiff of the liberty who awarded that return to hold plea after the matter removed in the common pleas.

If a man attach another or his goods for debt, &c. in F a liberty, and after the bailiff, by covin betwixt him and the defendant to discontinue the plaint, deliver the goods attached to the defendant, the plaintiff shall have an action upon the case against the bailiff, and the writ is such:

If A. shall make you secure, &c. then summon I. bailiff of the great court or market of N. that he be, &c. to shew wherefore, seeing that he the said bailiff upon the complaint of the aforesaid A. attached B. by certain of his chattels to answer the aforesaid A. in the court aforesaid, according to the law of merchants, as the custom is in our kingdom of England, of a debt of ten pounds, which the said A. requireth of the aforesaid B. and in the plaint aforesaid in the same court, between the parties aforesaid, it was so far proceeded, that they put themselves upon the inquisition thereof; the aforesaid bailiff, pending the inquisition aforesaid before him, by collusion had between himself and the aforesaid B. in the court aforesaid, maliciously departed, and refused to take the inquisition aforesaid, by which the plea aforesaid became discontinued, and he the same bailiff afterwards delivered the chattels aforesaid to the said B. the aforesaid A. not being satisfied of his debt aforesaid, to the damage of him the said A. of twenty pounds, as it is said, &c.

(a) And a man shall have an action of trespass upon G the case against his neighbour who hath lands betwixt him

(a) See 29 Ed. 3. 32. And the 1. 3. 15 Ed. 4. 18. or in the county where the land is surrounded ought to repair. 7 H. 4. 8. 14 Ed. 11 R. 2. *Action sur le Case* 36. An

him and the sea, and ought to make banks, and mound certain ditches and sewers betwixt him and the sea, and he doth not cleanse them as he ought to do, by reason whereof his land is surrounded, &c. he shall have his action upon the case against him for this non-feasance.

H If a man be committed unto the gaol for debt or arrearages of account, and the gaoler of malice prepenſe lay ſo many irons upon him, or ſet him in the ſtocks, or keep his victuals from him, by reaſon whereof he is ſo ſpent, that he becomes lame, or hath other infirmity; he ſhall have an action upon the caſe againſt the gaoler.

2 Term Rep.
K. B. 230.

If a man diſtrain any prior's or other prelate's horſe, whereupon he is riding in his journey, for or upon any contract, debt or trespas done by him or his predeceſſor, when he might have diſtrained or attached him by other goods or chattels of the ſaid prior or prelate, then he ſhall have an action upon the caſe, which is ſuch :

Vide Br. Attachment 23.
But if he hath no other goods, then he may attach theſe goods.

I If A. prior, &c. put B. &c. to ſhew wherefore, ſeeing that it is not lawful for any perſon to diſtrain a prelate, nobleman, or any eccleſiaſtical perſon of our realm, paſſing any where through the ſame realm by the horſe on which he is riding, by reaſon of any contract or debt, when he hath there other beaſts and chattels, whereby reaſonable diſtreſs may be made upon him; the aforeſaid B. diſtrained the ſaid prior paſſing through the town of C. by reaſon of a certain contract between S. formerly prior of, &c. predeceſſor to the aforeſaid prior, and the aforeſaid B. a great while ſince made, as it is ſaid, by a certain horſe, his palfrey, although he could have then made reaſonable diſtreſs upon him by other beaſts and chattels there, and maliciously detained that palfrey for a long time, by

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one ſhall have a view on this writ, and the writ ſhall ſuppoſe a tort done to him; otherwiſe *per Skin.* in a writ *de muro reparando.* 7 H. 4. 8. And yet by *Thirning*, if the plaintiff recover in this writ, he ſhall not diſtrain

pro non reparando. *Quære & vide* 7 H. 31. If the defendant has nothing in the land, by reaſon whereof he ought to repair, except in right of his wife, the writ ſhall abate againſt the huſband only.

which

which his weighty businesses, for which he made his passage, were undone; and other wrongs, &c.

3 H. 6. 36. b.
&c.

And if a man promise and take upon him to make for A another man certain carts for carriages, or other thing, and take money beforehand to do the same, and afterwards he do not make them according to his promise and undertaking; the other may have an action upon the case against him, and the writ shall be such:

If W. &c. then put I. &c. to shew wherefore, whereas he the said I. undertook to make and build three carriages for conveying victuals and tackle of him the said W. to parts beyond sea, for (a) a certain sum of money, one part whereof he beforehand received, within a certain term between them agreed; he the same I. did not take care to make and build the carriages aforesaid within the term aforesaid, by which he the said W. hath wholly lost divers his goods and chattels, to the value of one hundred marks, which ought to have been conveyed in the carriages aforesaid, for want thereof to the great damage of him the said W. as it is said: and have, &c.

42 Ed. 3. 11.
4 Ed. 6. 9.
22 H. 6. 21.
39.

And if a man be lodged in any inn, and any of his B goods be taken from thence by a stranger, he shall have an action upon the case against the innkeeper, and the writ shall be such:

The king to the sheriff, &c. If A. shall make you secure, &c. then put, &c. B. that he be, &c. to shew, &c. wherefore, whereas according to the law and custom of our realm of England innkeepers, who keep common (b) inns to entertain

(a) See this writ abated, for that it lies only on a fact, and there was no consideration mentioned in the writ 2 H. 4. 3. accords, because such action on the case lies only for a misfeasance, but not for a nonfeasance, because the default is to be specified, in 11 H. 4. 33. It is debated, whether the action lies, and whether he ought to declare in certain, what he ought to have on the agreement for his labour. 3 H. 6. 30. 14 H. 6. 18. 19 H. 6. 49.

(b) See 2 H. 4. 7. He ought to shew in his count, that the defendant

is a common host or innkeeper, otherwise all will abate. 1 H. 4. 45. It is there said, &c. that though the host or innkeeper delivers the keys to the guest, it does not discharge him. See *Dyer* 158. the host excused for that he refused to receive the plaintiff on a reasonable cause. See for remedies against hosts, who refuse to harbour guests, 18 H. 7. *Kelw.* 50. *Dyer* 158. 5 E. 4. 2. 42 *Aff.* 17. 11 H. 4. 45. 22 H. 6. 21. and 39, &c.

persons

persons passing by the places where such inns are, and lodging in the same, are bound to keep the goods of such persons deposited therein without subtraction night and day, so that by the default of them the innkeepers or their servants no damage may come in any manner to the guests: certain malefactors took and led away a certain horse of the price of forty shillings of him the said A. entertained within the inn of the aforesaid B. at S. found, by the neglect of him the said B. and other wrongs, &c. to the great damage, &c. And have, &c. Witness, &c.

C If a man sell unto another man a horse, and warrant him to be sound and good, &c. if the horse be lame or diseased, that he cannot work, he shall have an action upon the case against him.

9 H. 6. Action sur le Case 15.

And so if a man bargain and sell unto another certain (c) pipes of wine, and warrant them to be good, &c. and they are corrupted, he shall have action upon the case against him.

See 9 H. 6. 52.
11 H. 6. 18.

But note; It behoveth that he warrant it to be good, and the horse to be sound, otherwise the action will not lie. For if he sell the wine or horse without such warranty, it is at the other's peril, and his eyes and his taste ought to be his judges in that case. 26 H. 6. 35.

9 H. 6. 13.
contra.
Post. 98. K.
Dyer 75.

D But if a smith prick my horse with a nail, &c. I shall have my action upon the case against him, without any (a) warranty by the smith to do it well; and the writ

24 H. 6. 10.
46 Ed. 3. 19.

(c) Yea, though they were sold by a servant, 9 H. 6. and there it seems that action on the case lies without any warranty; so is 7 H. 4. 14. and see 11 H. 4. 6. where one sells clothes, and warrants them all to be of such a colour, if they are there in view of the buyer, though they are not all of such a colour, an action on the case will not lie. But if they are in another place, or are warranted to be of such a length, a writ on the case lies; if a servant sells clothes for his master, and warrants them, an action on the case does not lie against the servant on such warranty, nor (as

some held) against the master, for he did not warrant them.

Note a diversity between selling corrupt wines to merchandize, for there an action on the case does not lie without warranty; otherwise, if it be for a tavern or victualler, if it prejudice any. See 19 H. 6. 49. accordant.

(a) See 14 H. 6. 18. So if he promise, and does not shoe my horse. 19 H. 6. 44. 48 Ed. 3. 16. Case against a smith who refuses to shoe my horse. 21 H. 6. 55. 18 H. 7. Kew. 50.

shall

shall be, *Wherefore he fixed a certain nail in one foot of a certain horse of J. at N. by which it became putrid, so that the same horse for a long time could not work, and he the said J. during that time lost the benefit of his horse aforesaid, to the damage, &c.* For it is the duty of every artificer to exercise his art rightly and truly as he ought (b).

2 Inst. 4.

And if the sheriff or under-sheriff distrain any parsons E or vicars, or other spiritual persons, in any lands whereof they are possessed in the right of their churches, they shall have actions upon the case against the sheriff in this form :

The king, &c. If A. parson of the church of C. shall make you secure, &c. then put, &c. B. our sheriff of Somersetshire, and C. our under-sheriff of the same county, that they be, &c. to shew wherefore, seeing that in the articles of the clergy of our realm, granted by lord E. lately king of England, our progenitor, it is amongst other things contained, that our ministers, as sheriffs or others, take not the beasts of rectors of churches for any distresses in the royal way, nor in the fees whereof these churches were formerly endowed; the aforesaid sheriff and under-sheriff, the beasts of the aforesaid A. at L. in the fee of him the said A. of his church aforesaid, of which the same church was formerly endowed, took and led there from thence to S. and there impounded them, and for a long time detained them there impounded, against the law and custom of our realm, and contrary to the form of the articles aforesaid, and against our peace: and have, &c.

(b) If one retains counsel, and gives him his fee to assist him in the purchase of such a manor, if he becomes counsel for another, or discovers his counsel, case lies; yet though he warrants his client that he shall have the manor, but fails therein, yet if he does his endeavour, case does not lie; for perhaps he could not have the manor, *i. e.* it was impossible. 11 H. 6. 24. 55.

Trespafs on the case, for that the defendant assumed to cure his horse, *Et quod ille tam negligenter & impro-*

vide, &c. medicinal', &c. quod equus interiit; it was held, (1.) If one who is not a common farrier kills a horse by medicines, without doubt case will not lie, without a special promise. And (2.) held in that case by Newton and Ascough, that there being no such promise, case would not lie, though he was a common farrier, and so the assumpsit is traversable. 19 H. 6. 49. Sed vide contr. 48 Ed. 3. 6. 17 Ed. 4. 4. See 11 R. 2. Action sur le Case 37. 39. 21 H. 6. 55.

If

F If a man ought to be quit of toll for himself and his 7 H. 4. 44-
tenant and men, in every market or fair, &c. Now if
any officer or bailiff take a toll of him, his tenants or
men, he of whom the toll is taken, shall have an action
of trespass upon the case against him who took the toll,
or distrained his goods for the toll. And also he may
have a writ out of the chancery directed unto the bailiffs
or such officers, that they suffer them to be quit of toll,
&c. and he may have an *alias* and a *pluries*, and attach-
ment thereupon against the bailiffs or officers, if they do
not obey such writs, and the *pluries* shall be returnable
into the common pleas or king's bench.

G (a) If a man hath a manor within any honour, and by
prescription hath had view of frankpledge of his tenants
within his manor, &c. Now if he or his tenants be
distrained by the lord of the honour, to come unto the
leet of the honour, and to present there those things
which ought to be presented within the view of frank-
pledge within the manor, he who is distrained may have
a general action of trespass for this distress, or he may

(a) The abbot of *Farnham* brought
a writ against the sheriff of *Lancaster*,
and counted that the king had grant-
ed to the abbot's predecessors and
successors, the sheriff's turn within
the lands of *Farnham*, so that neither
the sheriff or other minister should in-
termeddle therein; and the sheriff of
Lancaster came to *Farnham*, and held
his turn within the said lands, and
caused the men of the franchise to
present matters presentable, who pre-
sented bloodshed by *I. S.* whereupon
the said sheriff distrained *I. S.* to come
to his turn of *Lancaster*, and then set
on him a fine of 10s. And when he
(the abbot) delivered to the said she-
riff the king's writ to surcease, and
he did not, he then delivered him an
alias, *pluries*, &c. And his writ men-
tioned all this matter, and that so the
defendant had entered into the fran-
chise to his wrong, and in contempt

of the king, and his commands, and
to his damage, &c. and it was re-
solved, 1. That this writ *tam quam*,
&c. is good, and the king shall be
answered therein. 2. That where
the writ was *quo minus idem abbas tur-
num suum tenere possit*, it is well alledg-
ed, (tho' not said ousted thereof,) *that he was disturbed in holding it; and so the action lies, and a respondeas awarded. M. 14 Ed. 3. 17 Ed. 3. 56. See action on the case for disturbance of his ferry, 22 Ass. 17.*

Trespas by the abbot of *Westm.*
for disturbing his bailiff to hold his
view which he had by the king's
grant, &c. and it was agreed, that
he need not shew the charter in this
action, but in a *quo warranto*; where-
fore the defendant pleaded, that he
and his predecessors had a view there,
absque hoc, that the abbot had a view.
Trim. 16 E. 3.

have

have a special writ directed unto the bailiffs or officers of the honour reciting the whole matter, commanding them that they suffer the lord of the manor to have and to hold his leet of the demesne, &c. as he hath used to do; and that they do not distrain him or his tenants in any wise to come unto the leet of the honour, to present any thing which ought to be presented in the leet of the manor; and also comprehending in the same writ, that if they have taken any distress for that cause of the tenant of the manor that he re-deliver it, &c. And upon that he may have an *alias* and *pluries*, and attachment against them, if they do not obey the aforesaid writs.

And also if a man hath used to have a gulf of water in any water, and it hath been used that no other should make a gulph in the same water, between his gulph and the gulph of B. now if another make another gulph betwixt them, he shall have his action upon the case in this manner (b). A

If A. parson of the church of C. shall make you secure, &c. put, &c. R. of T. &c. wherefore, whereas he the said A. ought to have, and he and his predecessors, parsons of the church aforesaid, from time beyond memory always hitherto have been accustomed to have a certain gulph in the water of W. in B. so that in the same water, between the gulph of him the said A. and the gulph of S. of E. lord of the manor of H. none ought or have been accustomed in any times past to make any gulph, fix pales or clays, or place any nets for taking fish therein; he the said R. (a) hath fixed clays and pales between the gulphs of the aforesaid A. and S. in the same water, and hath placed nets for taking fish therein, and there fished, and carried away the fish thereof, by which he the said A. lost the profit of the aforesaid gulph to the value of one hundred shillings; and other wrongs, &c. And have, &c.

9 Co. 28.
1 Vent. 399.
Comb. 198.

And if a man have a liberty to return writs, and to B execute them, if the sheriff *ex officio* enter into the liberty,

(b) But not for erecting a new mill or school-house, which draws away all the custom; *contra*, of a ferry or fair. 22 H. 6. 14.

(a) And if the writ be *vi & armis*, it shall abate, 31 Ed. 3. *Action sur le Case* 38.

and execute any process there, the lord of the liberty shall have an action upon the case against him; and these writs do appear in the register.

- C If a man be found in arrearages before auditors, for which the auditors commit him to the gaol, and afterwards he escape from thence, now the goaler ought to pay the money which was arrear upon the account. And the goaler shall have his action upon the case against him who escaped to answer unto the king for the escape; and to the goaler for the damages which he hath sustained; the form of the writ is such:

The king to the sheriff, &c. We have received information from the grievous complaint of A. that whereas B. lately rendered his account for the time wherein he was bailiff of C. in N. to the same C. within the liberty of K. and he the said B. was afterwards arrested for the arrearages of that account by the auditors of the same account, and was delivered to the aforesaid A. keeper of our gaol of our liberty aforesaid, to be kept in the same gaol until he should have fully satisfied the aforesaid C. of the arrearages aforesaid, according to the form of the statute provided touching such receivers and bailiffs, the aforesaid B. against our peace, escaped out of the custody of the aforesaid A. the aforesaid C. not being satisfied of the arrearages aforesaid, by reason of which escape he the said A. hath fully satisfied the aforesaid C. of those arrearages according to the form of the statute aforesaid, to the great damage and grievance of him the said A. and because we will not leave that trespass unpunished, if it was so committed, we command you, that if the aforesaid A. shall make you secure, then that you attach the aforesaid B. by his body, so that you may have him before us, &c. to answer to us for the escape aforesaid, and to the aforesaid A. for the damages which he hath sustained by reason of that escape: and have there this writ, &c.

- D And if a man play with another at dice, and he have false dice with which he playeth, and get the other's money with these false dice, he who loseth his money, may have his action upon the case for this deceit, and the form of the writ is such:

The king to the sheriff, &c. If A. shall make you secure, then put, &c. T. of D. &c. that he be, &c. to shew wherefore,

2 R. Abr. 100.

fore, whereas the aforesaid T. of D. contriving deceitfully to defraud him the said A. and to extort divers sums of money from the same A. excited and procured the said A. to play at dice with him the said T. at a certain game called the dozen, for divers sums of money, at Burton upon Trent, and the said A. there played with him at dice at the game aforesaid, the aforesaid T. certain dice truly titled delivered to him the said A. to throw, and when the said dice happened to come to the hands of him the said T. he the same T. falsely and fraudulently threw certain other false dice, and deceitfully titled, which he knew would turn up number twelve and no other number at every throw, by which he the said A. lost great sums of money to him the said T. at that game, and the said T. falsely and deceitfully took and carried away those sums under colour of gain, to the damage of him the said A. of five pounds, as it is said: and have you there the names of the pledges, and this writ. Witness, &c. And this writ was sued anno 5 Ed. 4. which see in the Register 240.

And although the defendant do not entice the plaintiff to play, yet if the defendant play with false dice, &c. by which he gets the plaintiff's money; it seemeth the plaintiff may maintain this action well enough, because the enticement is not the cause of the action, but the casting of the false dice, by which he gaineth the money, &c.

Writ of Disceit.

Vide Long 5 Ed.

4. 40.

18 Ed. 2.

Disceit 41.

This writ can-

not be sued by

attorney.

THIS writ (a) lieth properly where one man doth E
 any thing in the name of another, by which the
 other person is damnified and deceived; then he who is
 so
 19 H. 6. 50. It shall not abate for form, if it hath matter of substance.

(a) And *note*; Such writ lies notwithstanding the record on which it is founded be cancelled or avoided before. See 17 E. 3. 12. § 1.

If one answers for another as attorney without any warrant, the de-

fendant may move this pending the plea; but if judgment be given, he is put to his writ of disceit against the attorney, and he shall recover damages; and if the defendant (plaintiff) was party to the disceit, he shall have

so damnified shall have this writ, and the writ is without the words *vi & armis*, and the writ is such :

The king to the sheriff of Lincolnshire, greeting : If A. shall make you secure, &c. then put, &c. P. &c. as well to answer us as the aforesaid A. wherefore he fraudulently and maliciously in our court of chancery obtained our certain writ by a fine of twenty shillings, taken for our use, for the writ aforesaid, in the name of the aforesaid A. who was wholly ignorant of this, in disceit of our court, to the great damage of the said A. And have you there the names of the pledges and this writ, &c.

26 Ed. 3. 65.
Disceit 58. The king shall have this writ, if no other will sue it, because it is penal, 19 H. 6. 44. So if a man levy a fine, confess an action or recog. or statute, or appear as vouchee in my name.

By which it appeareth, That if a man purchase a writ in my name, for which writ I ought to pay a fine in the chancery, as the course there is for every writ of debt of the sum of forty pounds or more, to pay for every writ of forty pounds 6s. and 8d. and if it be of one hundred marks 6s. 8d.; and so for every hundred marks 6s. 8d. and so for every writ of plea of land, which is *præcipe quod reddat*, if it be not a writ of right patent, for every writ which is of the yearly value of five marks 6s. 8d. &c. and so according to that rate. And then if a man purchase such a writ in my name, and I know not thereof, I shall have this writ of disceit.

Bro. Fines pur Contempt 63.

19 H. 6. 44.
7 H. 6. 33.

A And if I present one unto a church whereof I am the patron, unto the ordinary, and one T. disturb me, for which disturbance another purchase a *quare impedit* in my name returnable in the common pleas against the said T. I not knowing thereof, and afterwards cause the writ to abate, or me to be nonsuit in that writ, I

have the writ against both, and recover. 21 Ed. 3. 45. by *Thirning*.

A. brought a writ of disceit against B. for that he had sued an original writ of debt, and three *capias*'s in the name of C. without his assent against A. whereby A. was vexed, and put to costs; the defendant, as to the original, pleads the consent of C. and as to the *capias*'s, pleads an award. It was moved, that the last plea might go to the whole; for A. was not da-

maged by suing of the original, so no action lies for that; yet by the better opinion, seeing that was the beginning of the tort, he shall answer it. 7 H. 6. 43.

See Mich. 38, 39 Eliz inter Gellibrand and Hubbart, Moor's case 866. in the star chamber, agreed that if one levies a fine in another's name, a *vacat* thereof shall be entered on the roll. See divers precedents there cited accordingly.

shall have this writ of disceit against him who purchased that writ, &c.

19 H. 6. 44.
If a man make
an obligation in
my name, I shall
not have disceit,
because I may
plead non est
factum.

If one forge a statute-merchant in my name, and sue B
a *capias* thereupon, for which I am arrested, I shall have
this writ of disceit against him that forged it, and against
him who sued forth the writ of *capias*, &c.

If a prior or abbot have title to present unto a vicarage C
whereof they are parsons imparsoned, any clerk secular
or regular at their wills; and afterwards another forge
a grant in the name of the abbot or prior under their
covent seal, that they grant to one of the parishioners,
&c. that they shall present a secular person, and not a
regular, as a canon or such, &c. the prior or abbot may
have a writ of disceit, and the form shall be such:

*If the prior of Bartholomew of the suburbs of London,
&c. put, &c. W. and B. &c. that they be before us in eight
days of Saint Martin, wheresoever, &c. to shew wherefore,
whereas the same prior ought and hath hitherto been accus-
tomed, at his will to present a fit secular or regular person to the
vicarage of Saint Sepulchre without the walls of London,
which church the same prior holds to his own use; the afore-
said W. and B. by collusion betwixt them before had, maliciously
contriving to injure the aforesaid prior, counterfeited the common
seal of the said priory, and certain letters patent by which the
predecessors of the aforesaid prior are supposed to have granted, that
the same prior and convent of the place aforesaid should present
a secular person, and no other, to that vicarage, have caused
to be sealed with the said counterfeited seal, and have exhibited
those letters sealed with the said seal in a certain cause moved at
the instance of him the said W. as a parishioner of the church
aforesaid, between him the said W. and the aforesaid prior,
before the official of the court christian of Canterbury, upon
the removal of friar R. of F. canon of the aforesaid prior, ad-
mitted upon his presentation to the vicarage aforesaid by the
bishop of London, and have procured him the said prior to be
wearied divers ways in this matter with labour and expences by
virtue of the letters aforesaid, to the great expence and grievance
of him the said prior: and have you there the names of the
pledges and this writ, &c. Post. 98. N. 22 Ed. 3. 11.*

And

D And if a man be attorney for another in a plea real against the demandant, and afterwards by covin between the attorney and the demandant, the attorney make default, for which the land is lost, the tenant who lost the land shall have a writ of disceit against the attorney, and the writ shall be such :

To shew wherefore, whereas the said A. made the aforesaid B. his attorney before us, in a plea which was before our same justices by our writ, between K. demandant, and the aforesaid A. tenant, of twenty acres of land with the appurtenances in C. to gain or lose in the plea aforesaid, the aforesaid B. by collusion had between him and the aforesaid K. absented himself gratis at a certain day prefixed by the aforesaid justices in the same plea in the bench aforesaid, by which the said A. for the default of him the said B. lost his land by the consideration of our court, in deceit of our same court, and to the great damage and manifest danger of the disherison of him the said A. And have, &c.

E And if an action of trespass be brought against many, and the plaintiff and one J. by covin between them cause certain persons to come into court and say, that they are the same defendants, and that they make the said J. their attorney, and afterwards the said J. as attorney for the defendants, plead unto issue, and afterwards suffer the inquest to pass by default, by which the plaintiff recovers against the defendants: now those who are the true defendants shall have a writ of disceit against J. who appeared as attorney for them, &c. and the writ appeareth in the Register.

And so if R. recover in an assise against W. certain tenements and damages, and because W. hath nothing in the same county to levy the damages, R. remove the record of assise into the king's bench or common pleas, to sue forth process thereupon, and to have execution of the said damages recovered, for which the said W. to defraud the said R. of his execution, sueth for a writ to remove the record in chancery, surmising that he will have an attaint thereupon before the justices of assise, &c. by which the record is removed into the chancery, and

delivered to the said *W.* to carry to the said justices of assise, whereupon he may sue his attaint; now if the said *W.* will not sue forth the attaint, but delay him, to oust him of his execution, *R.* who recovered shall have a writ of disceit against him upon the matter, which appeareth in the Register.

One *I. de A.* sueth a *præcipe quod reddat* against *C.* and *T.* his wife, who plead a fine levied to the said *T.* by one *F.* and *Margaret* his wife, mother of the demandant, &c. and the defendant saith, that his mother's name is *Margery* and not *Margaret*, and after day is given by the court, at which day *C.* and his wife procure and cause a stranger to come into court, and confess the fine as the tenant hath pleaded, by which the demandant is barred, the demandant shall have a writ of disceit against the said *C.* and *T.* his wife, as appeareth by the Register. But it seemeth, that if *Margery* do levy a fine of her land by the name of *Margaret*, that she (*a*) and her heirs shall be concluded to say, that she hath another name. But the tenant may plead, that she by the name of *Margaret* did levy a fine of her land, &c. and that hath been done where a woman had to her name *Agnes*, and she levieth a fine by the name of *Anne*, it hath been awarded good, and shall bind her and her heirs, and shall be pleaded, that she by the name of *Anne* levied the fine.

c Ed. 4. 40.
B. Confess. &
Avoid. 40.
Where a man
levieth a fine of
my land in my
name, I may
confess and avoid
the same, as to
say that another
of the same name
levied the same;
without that,
that I levied the
same; for I shall
not have disceit;
by Littleton and
Danby.

20 H. 6. 10.
and the writ was
brought where
he was at the
time of this pro-
tection.

44 H. 3. 4.

If a man sueth a protection, and doth not go, this writ lieth; contrary, if he go, though he presently return.

If a man sue a *præcipe quod reddat* against divers tenants, and they purchase a protection for one of them, surmising that he is beyond the seas upon the king's service, whereas he is and always hath been remaining in *England*, by

(a) See accordant 13 Ed. 3. *Eslop-pel* 231. 1 Aff. 11. 3 Aff. 4. where one granted a reversion on an estate for life, which he leased by the name of *Gilbert filius Stephani*. In a *quid juris clamat* against the son of the lessor, he pleads, that his father's name was *Richard Fitz-Stephen*, &c. where- by there ought to have been an at-

tornment to the grantee, *cumque hoc*, that *G.* and *G.* named in the note, &c. are one and the same person, and thereon the tenant went without day, i. e. the plaintiff was nonsuit; yet it was agreed, that the reversion passed. 11 Ed. 3. *Quid Juris* 2. 9 Ed. 4. 42.

which

which the demandant is delayed: the demandant shall have a writ of disceit against the tenants for that delay; and the writ shall be such:

If A. shall make you secure, &c. then put B. and C. &c. that they be before, &c. as well to answer us as A. wherefore, whereas he the said A. in our court before our justices of the bench impleaded (a) by our writ the aforesaid B. and C. of three parts of the manor of S. with the appurtenances, they the said B. and C. manifestly contriving to evade our court and the law and custom of our realm of England, and to delay the prosecution of the aforesaid A. in this behalf at a certain day prefixed to the said parties in the same plea before the said justices, caused to be produced before the said justices our certain letters of protection, comprizing that he the said C. was then gone into parts beyond the seas in our service, and so he was to be quiet touching all pleas and complaints, except pleas of dower unde nihil habet, and quare impedit, and assise of novel disseisin, and darrien presentment, and attaints, and except pleas in which he might happen to be summoned before our justices in eyre in their circuits, he the said C. (b) being then, afterward and before that time, continually residing in England, by which that plea before the said justices remained without day, in manifest contempt of us, and in deceit and manifest evasion of our court aforesaid and of the laws and custom aforesaid, and also to the great expence and manifest danger of the disherison of him the said A. And have there, &c.

C In a *præcipe quod reddat*, if the sheriff return the tenant summoned where he was not summoned, by which the

(a) See such writ of disceit brought for purchasing a protection, *quia moratur*, and laid in the county where the protection was, and it may be in the county where the *moration*, or abiding was, *per Cur'*, 20 H. 6. 10. the abbot of Selby's case, without shewing either in the writ or the count, the date of the protection. 20 H. 6. 18.

(b) But it is a good plea to say, that the malady took or seized him going, &c. so that he could not go,

&c. 18 Ed. 3. 12. See such writ brought against one who purchased a protection, *quia moraturus*, whereas he was not at the time of the protection cast, remaining *in obsequio nostro*, *sed apud B. &c. propriis negotiis intendendo*, the defendant shews his detainer and safeguard to Calais, and that he returned by the lieutenant's command to buy victuals, &c. *absque hoc*, that he was intendant *propriis negotiis*. 20 H. 6. 24.

Post. 107. H.
104. P.

defendant loseth his land by default at the *grand cape* returned, the tenant shall have a writ of disceit against him who recovered, and against the sheriff for his false return, and by that writ the tenant shall be restored unto his land again. And it seemeth the tenant shall have this writ after judgment given for the demandant against him that recovered before any entry or possession: for if the tenant shall not have a writ of disceit before the demandant doth enter, then perhaps the demandant will not enter, until the summoners in the *præcipe quod reddat*, and the summoners, viewers and perners in the *grand cape* (a) are dead, and then he shall not have a writ of disceit after their deaths; for whether he were summoned or not shall be tried by the (b) summoners, and viewers and perners, by examining of them. But see 3 *Ed.* 3. That the tenant shall not have a writ of disceit before the demandant hath entered; *tamen quere*. And in a writ of disceit the process shall be made against the summoners, viewers and perners to be examined thereupon, &c. And if the demandant who recovered by false return of the sheriff, make a feoffment of the land, then the writ of disceit lieth against the demandant who recovered, and against his feoffee and the sheriff, and if the demandant who recovered be dead, and the sheriff also, yet the

3 *Ed.* 3.
Disceit 47.
18 *Ed.* 2.
Disceit 54.

(a) But yet he shall have case against the sheriff, 1 *H.* 6. 1. and recover damages. 6 *Ed.* 4. 3. *Note*; If in this writ the sheriff returns the party warned, where in truth he was not, and judgment is given that the demandant shall have restitution, he shall have this writ against the sheriff, and if the disceit is found recover damages, but not defeat the remedy had. 8 *H.* 6. 2. *per Sharf.* for he cannot lose by the default, but by the disceit found he may.

(b) *Note*; The process is a *venire facias*, &c. and if the summoners, &c. appear, but he who recovers, or the party are not warned, the summoners shall be examined, and a

disfringas shall issue; and if the disceit be found, judgment may be given instantly against them who made default, without a *disfringas*, or writ of *scire facias*, 8 *H.* 6. 2. 50 *Ed.* 3. 18. or he may have a *disfringas*. 12 *Ed.* 3. 21. *Note*; He may have also a writ of disceit against the party to the recovery, &c. See 8 *H.* 6. 1. 30 *Ed.* 3. 49. So he may have it against the party who recovers, or his heir, and a *scire facias* after the disceit found, against the tertenant. 18 *Ed.* 4. 11. 38 *Ed.* 3. 16. See 18 *R.* 2. *Disceit* 49. 8 *Ed.* 3. 6. 8 *H.* 6. 2. 20 *Ed.* 3. 43. 8 *H.* 4. 24. *contr.* 38 *E.* 3. *contr.*

Writ

writ of disceit lieth against the demandant's heir, and against him who is tenant of the land, if the summoners, viewers or perners be living: but if the summoners, viewers or perners be dead, then the writ of disceit is lost. But a writ of disceit lieth if any of the summoners, viewers or perners be alive; for if they say that they did not summon him, then the plaintiff in the writ of disceit shall recover his land and shall be restored, &c. for it ought to be done by two (c) summoners at the least, and two viewers, &c. And if any of them do not that which it is returned they have done, then the writ is not executed as it ought to be, by which the plaintiff in the writ of disceit ought then to be restored, &c.

18 Ed. 4. 11.
38 Ed. 3. cont.

35 H. 6. 46.
1 Ed. 2.
Disceit 48.

D And in a *scire facias* to execute a fine, if the sheriff return the tenant summoned by two summoners, though it be not true, yet the tenant by the return shall lose the land, for execution shall be awarded upon the return, if the tenant do not appear, and then the tenant shall have a writ of disceit against the sheriff, and him who had execution, and him who is tenant, and shall be restored to the land (a).

And so if a man (b) sue a *scire facias* upon a recognizance of debt, and the sheriff return the defendant summoned,

Post. 98. R.
99. H.

(c) And therefore if one of the summoners says that the summons was not made, and the other that it was made, the demandant shall recover. 8 H. 6. 2. 50 Ed. 3. 17. So if one makes the garnishment, and the other was on the land at the same time for the same purpose, but says nothing, the demandant shall recover. 5 Ed. 3. 65. 8 Ed. 3. 5. See 2 Ed. 3. 21.

(a) *Contra per fine*. He shall recover only damages, and for that it shall be tried by the inquest. 1 H. 6. 5.

(b) See *Rot. Parl.* 21 Ed. 3. nu. 25. A petition for a writ of disceit in the like case.

Note; A brought a *scire facias* against B. upon a fine, whereby the

tenements were rendered to B. in tail, remainder to C. &c. the tenant pleads that the queen had a writ of disceit pending, to reverse the fine; for that the tenements were parcel of her manor of D. which is ancient demesne, and that she held the manor for life by a lease from the king, and thereupon day was given to the parties. And now the queen's attorney (and B. the tenant) appears, who says, That he knows nothing why the fine should not be reversed. And now A. *ex gratia curiæ* was received to answer, wherefore the tenant did not deny, &c. and he demanded judgment of the writ. 1. For that A. and C. to whom the estate is limited by the fine are not made directly parties to the writ; *sed non allocatur per Cur'*, who said,

moned, where he is not summoned, for which the plaintiff hath execution awarded, the defendant shall have a writ of disceit against him who had execution, and the sheriff shall be punished by this writ for his falsity, and the party who recovered shall make restitution of that he recovered, &c. (c).

And

said, That this writ is good, and shall be always brought against the tertenants. 2. That the queen had nothing in the manor, nor had at the day of the writ purchased; for she had demised it before. — *Wilby*. This suit is given to the king, but that is where no other will sue; will you say any thing else? And then he shewed an amerciament and fine, and also an ancient recovery of the same tenements, in an action tried at common law. *Jedd*. Seeing by this ancient fine and recovery, the tenements are become franck-fee, and pleadable here; *quære*, if they should now be received, to reverse the late fine, without suing to reverse the former fine and recovery, which are still in force; and for that he was a stranger to the fine, and also to the suit, and did not shew it *sub pede sigilli*, and a writ to allow it: Therefore by *Wilby* it is no plea; for on a *nient comprise* pleaded, it cannot be tried between the parties. 26 *Ed. 3.* 66. And so *note*, that a fine of elder date will hinder the reversal of a fine of later date by a writ of disceit, but not *e converso*. See 21 *Ed. 3.* 25, 26. acc.

(c) And also the issues in the mean time. *Mich. 16 Ed. 3.* But not damages. 18 *Ed. 3.* 28. And *note*; the king shall have the issues in disceit, on a recovery by default on a *præcipe*. 29 *Ed. 3.* 34. See 8 *H. 6.* 2. 41 *Ed. 3.* 2. 10 *Ed. 3.* 18. That he shall recover all in damages against the sheriff, see the fine avoided between the parties, for that the court had not jurisdiction thereof. 9 *H. 7.* 12. and 8 *Ed. 4.* 6. *per Littleton*.

And *note*; In a writ of disceit on a fine levied of such and such lands, &c. and error brought in *B. R.* the transcript of the fine was removed thither: and the court being apprised by the record, that the manor (of which the lands were alledged to be parcel) was ——— and by the consufance on the defendant's part, or otherwise by verdict, that it was parcel of the manor; judgment was given that the fine be reversed; and yet by force of this process, and for that other lands were rendered by the fine, the fine was not taken off the files, but only marked *quoad* those lands. 21 *Ed. 3.* 20. 17 *Ed. 3.* 31. But *note*, That he who is tertenant ought to be made party by the *scire facias*; for the consufance of him who is party to the fine, shall not bind the tertenant, if the lands are (not) ancient demefne. 7 *H. 4.* 44. 8 *H. 4.* 29. See also in disceit by the queen, on a fine levied of lands in ancient demefne; and by the transcript it appears, that the lands were rendered in tail to *A.* remainder to *B.* in tail, &c. and a *scire facias* sued against the tertenants (which seem to have been the issue of *B.* in tail, but was not so supposed by the writ) who acknowledge the lands (except eight acres which were frank-fee); and *Thirning* would not avoid the fine, till those in remainder were made parties by *scire facias*. 21 *Ed. 3.* 56. But it is sufficient if the tertenant only be made party to the writ. 16 *Ed. 3.* 66. *Note*; By the case aforesaid, it appears it is in the plaintiff's election to bring a writ of disceit against the consufor of the fine and the

A And if a man levy a fine at common law unto another of land which is in ancient demesne, the lord of ancient demesne shall have a writ of disceit against him who levied the fine, and he who is tenant shall avoid the fine, and there he who ought to give the land shall be restored unto his possession and title which he hath given by the fine, because the fine and gift thereby is avoided. But if he who levieth the fine, have after by his deed released unto him who hath the possession by the fine, or by the deed confirmed his estate in the land, then he unto whom the release or confirmation is made, shall have and keep the land notwithstanding that the fine be avoided, because that release or confirmation made unto him being in possession, hath made his estate firm and rightful, against him and his heirs who released or confirmed the same.

B If a man do recover in a writ of waste where the tenant was not summoned, &c. the defendant shall have a writ of disceit, and shall be restored. *T. 9 Ed. 3.* See *17 Ed. 3. 58.* *29 Ed. 3. 42.* *29 Ed. 3. Disceit 63* and *56.*

C If husband and wife lose the land of the wife by default, they may sue a writ of disceit, and if the husband die, it seemeth the wife may sue a writ of disceit to be restored to her land, &c. or have a *cui in vita* upon the statute at her election; and the writ of disceit shall be directed unto the same sheriff who did the disceit, and false return, and not unto the coroners, as appeareth *Trin. 20 Ed. 3.* Yet it seemeth it is not error, if it be directed unto the coroners, &c. *20 Ed. 3. Disceit 4.*

D (a) And in a writ of disceit, if the sheriff return one summoner dead, yet the other summoner shall be examin-

35 H. 6. 46.
8 Ed. 4. 6. cont.
Cruise on Fines
p. 96.
Salk. 57.
2 Bl. Rep. 1170.
Where a man
loseth by præcipe
in capite, where
he ought to have
sued in the lord's
court, and the
lord brought dis-
ceit for the pro-
fits of the court.
48 Ed. 3. 20.
17 Ed. 3. 18.
20 Ed. 2.
Disceit 5. ac.
19 Ed. 3.
Disceit 3.
19 Ed. 2.
Disceit 56.
20 Ed. 3.
Disceit 4.
he shall not have
disceit, by Wil-
by. Hill. cont.
20 Ed. 3.
Disceit 5.

the tertenant, or otherwise to bring it against the conusor alone, and to have a *scire facias* against the tertenants; *quod nota*; and so it is in disceit on a recovery for non-summons, &c. See *38 Ed. 3. 1.* See *1 Lutw. 712.* *18 Ed. 4. 6.* *36 H. 6. 34.* *contr. 17 Ed. 3. 31. contr. See 10*

Co. 50. a. 2 R. 3. 21. 15 H. 7. 12.

(a) So in waste, where the writ issued to the sheriff who found the waste, by *Disceit. 30 Ed. 3. Disceit 5.* See *8 H. 6. 2. 8 Ed. 3. 6. 8 H. 6. 5. 35 H. 6. 46.*

ed, &c. And if it be found that he did not summon, &c. the party shall be restored unto the land, and so if one viewer or pernor did not do that which he ought to do, the party shall be restored, because it ought to be done by both, &c. But if summons be by four men, as long as two of them are alive, the tenant who lost may have a writ of disceit.

8 H. 6. 1.
18 Ed. 4. 1.

19 H. 6. 29.
50. 71.

And a writ of disceit lieth against him who embezzles a writ, and also against him who procureth another to embezzle a writ, if it be embezzled, &c. and they may be joined in the same writ. See 19 H. 6. 29. 50. 72. 9 H. 6. 5. 8 H. 6. 20. 50.

20 H. 6. 34.
16 Ed. 4. 9.

And if a man bargain with another to infeoff him (a) of certain lands, and afterwards infeoff another man, he with whom he made the bargain shall have a writ of disceit (b).

26 H. 6.
Disceit 15.
27 H. 6. 5.
vide 34 Ed. 3.
Disceit 57.
Neither the
clerk nor the
def. ousted.
9 Ed. 4. 33.
Lit. acc.

(c) And if a man recover in a *quare impedit* by default, &c. if the defendant be not summoned, he shall have this writ, and the summoners and pledges upon attachment shall be examined thereupon: and if the deceit be found, he shall have writ unto the bishop, &c. for him.

If an action of debt be brought against two as executors, where one of them is not executor, if he who is not executor confess the action, he who is executor shall have a (d) disceit against him, and recover as much in damages.

10 Ed. 4. 9.

If an attorney be not informed by his client to plead in any action, and he plead, *That he is not truly informed, and therefore can give no answer*, &c. the same shall be entered to save him of damages in a writ of disceit brought against him by his master, &c.

(a) So if he grant a rent-charge, or acknowledges a statute, and after re-enfeoffs according to an agreement; or if he makes a feoffment to another, and after re-enters and infeoffs another, and the first feoffee enters. 20 H. 6. 34, 35. Note here, it was a bargain without a deed.

(b) See 16 Ed. 4. 9. 3 H. 7. 14. 21 H. 7. 41.

(c) But where the king recovers, the party must sue by petition to the

king; and if he answers, *let right be done*, he shall have a writ of disceit; and if he answers, *let the disceit be examined*, then on that indorsement they may proceed, but without writ. 10 H. 4. 4. See 27 H. 6. 5. 26 H. 8. 34. 34 Ed. 1. Disceit 17.

(d) See 9 Ed. 4. 13. 21 Ed. 4. 24. 48 Ed. 3. 25. 11 H. 4. 84. 20 Ed. 4. 9. 51.

- K** If a man sell cloaths, and warrant them to be of a certain (*e*) length, if they be not of such length, he who bought them shall have a writ of disceit against him upon his warranty, although the warranty be only by word; but if the warranty be made at another time after the bargain made, then it ought to be in writing, otherwise he shall not have an action upon that warranty; for he shall not have an action of disceit therefore, if the warranty be not made upon the bargain and at the time of the bargain. 11 Ed. 4. 6. 5 H. 7. 41. 2 Ld. Raym. 1120. 1 Str. 414.
- L** The writ of disceit ought to be brought in the county where the disceit is supposed to be done*. 9 Ed. 5. 7.
- M** If a man recover in a *præcipe in capite* by default, where the lands are not holden of the king, and he have not the lord's licence to sue in the common pleas, the lord shall have a writ of disceit, and (*f*) recover damages; but the recovery shall stand in force, and the lord shall have the seignior, and he who recovered shall also hold of the king by way of estoppel (*g*). 8 Ed. 4. 6. Infra 103. A.
- N** If a man procure another to sue an action against me to trouble me, I shall have a writ of disceit. 1 Salk. 14, 15. 3 Cro. 378.
- O** A writ of disceit shall be maintainable against the attorney and the sheriff, because they put a writ of *habere facias seisinam* upon the file of the sheriff's writ, where they have not any record to warrant it. See 17 Ed. 3. 51. 2 Inst. 2. 215.
- P** If a man levy a fine of land in ancient demesne, and also of land at the common law, the party shall have a writ of disceit for the ancient demesne land, and shall 21 Ed. 3. 20. 5 Ed. 4. 6. 17 Ed. 3. 31. Disceit 37.

(*e*) Because it cannot be tried but by parol proof; so if one warrants wares to be of such weight, &c. if found not to be of such weight, &c. at the time of the warranty. 11 Ed. 4. 6. 13 H. 4. 1. and see by *Hankf.* 13 H. 4. 1. and *Choke* 11 Ed. 4. 16. If the vendor warrants a horse to be found, where he has a defect that is apparent to the senses, disceit does not lie; *contra* by *Thirning*, if the horse be not there present. *Salk.* 211.

* The venue may be changed in deceit. *Barnes* 491. But *contr.* 1 *Sid.* 87.

(*f*) But he shall not recover damages as for loss of a seignior or court; for the seignior remains, and the loss of the court is only *pro hac vice*. 17 Ed. 3. 31. 37.

(*g*) See a writ upon this case, 17 Ed. 3. 59. *Quære* 10 Ed. 4. 6. 37.

avoid the fine for that land, and the fine shall stand good for the land at the common law (a).

If a man lose land by default in a *præcipe quod reddat* (b) Q and die, his heir shall have a writ of disceit as well as the father, and shall have restitution.

15 Ed. 3.
Disceit 43.
18 H. 2. ib. 50.
post. 99. H.

If a man have execution by default upon a recognizance R in a *scire facias* sued out against another, and the defendant die, his executors shall have a writ of disceit, and shall be restored, &c. If the disceit be found that their testator was not warned, there the garnishers shall be examined, &c.

18 Ed. 3.
Disceit 42.

[99]

3 & 4 Ed. 3.
Disceit 45.

And if a man recover an annuity, and afterwards sue a S *scire facias*, and recover by default, the defendant shall have a writ of disceit, if he were not warned.

And the vouchee shall have a writ of disceit where he A loseth by default, if he were not summoned, &c. *Post.* 106.

18 Ed. 2.
Disceit 54, 55.

In a *præcipe quod reddat* against the husband and the B wife at the grand cape, the husband appeareth in person, and the wife appeareth by attorney, who hath a warrant which is insufficient, by which judgment is given upon the default of the wife against the husband and wife, &c. yet they shall have a writ of disceit, if they were not summoned, &c.

19 Ed. 2.
Disceit 56.

And where a man loseth by default in a *quare impedit*, C or waste, the summoners and the pledges upon the attachment, and the manucaptors upon the distress, must be examined, when the writ of disceit is brought upon it. See in the title of *disceit* in the abridgments for that matter. 29 Ed. 3. 42.

If a man sue a writ of *monstravit* against another to ac- D count, &c. where he hath sufficient lands in another county, by which he may be brought to answer by writ of account, the defendant shall have a writ of disceit

(a) See 7 H. 4. 44. 17 Ed. 3. 17 Ed. 3. 59, &c. 8 Ed. 3. 6. 31. 21 Ed. 3. 20. 18 R. 2. Disceit 30 & 50. 15 Ed. 3.

(b) And the parol shall not demur for nonage of the demandant, if a deed of the ancestor be not pleaded. Disceit 43. 8 Ed. 3. 62. 52. 8 H. 6. 2. 15 Ed. 3. Disceit 45.

against the plaintiff who sueth the *monstravit, quod vide Mich. 9 Ed. 2. Fitz. Disceit 52.*

E If tenant for life lose by default, where he was not summoned, and die; he in the reversion shall not have a writ of disceit, because he shall not have a writ of error, but by the statute, &c. So 8 Ed. 3. 6. *per Parning*, clearly.

Dyer 241. b.
8 Ed. 3. 6. 52.

If a man be tenant for life of a manor in ancient demesne, and the tenant of that manor levy a fine of his land at the common law, the lord of the manor who is tenant for term of life shall have a writ of disceit, and after his decease, he in the reversion shall have a writ of disceit, and reverse that fine. 17 Ed. 3. 58. *vide supra B.*

1 Ed. 3. 5.
So of lessee of years.

F If the king recover in a *præcipe quod reddat*, or in a *formedon* against another man by default, the tenant shall have a writ of disceit, as well as he shall have writ of error, where the king recovereth by erroneous process, &c. or erroneous judgment. See for this matter *M. 10 H. 4.* in title *Traverse* in the abridgments.

10 H. 4. 4.

G And this writ of disceit shall sometimes issue out of the common pleas (a) or a man may sue it out of the chancery, if he will; as if he lose lands by default in a *præcipe quod reddat* in the common pleas, the tenant, if he were not summoned, shall have a writ of disceit out of the common pleas, if he will, or out of the chancery. *Vide ante 98. R.*

22 Ed. 3.
Disceit.

H And so if a man have execution upon a recognizance in the common pleas or king's bench by default, &c. the defendant shall have a writ of disceit, if he were not summoned out of that court where the execution was sued, &c. or out of the chancery, at his election.

17 Ed. 3. 51.
Disceit 39.

I And there are divers other writs of disceit, in the form of a writ of *audita querela*, as if one sue a *præcipe quod reddat* against another, and the tenant is esloined at *quind' Pasch'*, which essoin is adjourned until 15 *Trin.* the term

(a) Note 3 Levinz. 419. 22 Ed. 3. 11. *contra.* *Vide ibid.* 51.

17 Ed. 3. 51.
Disceit 9.

(b) following, and the demandant and his attorney by covin betwixt them cause a writ to be recorded on the file of writs, that the tenant hath made *N.* and *M.* his attornies jointly and severally at the said *quind' Pasch'*, by which the demandant challengeth that essoin, because he had attorney in the writ not essoined, by which at the day of adjournment the essoin is quashed, and the demandant recovereth the land by this default at *quind' Pasch'*: now the tenant shall have a writ of disceit against the demandant and his attorney, and the form of the writ shall be in the nature of *audita querela*, and shall be directed unto the justices of the common pleas, and is such:

The king to his justices of the bench, greeting: I. of B. hath shewed unto us, that whereas W. of B. lately impleaded him the said I. before you in the bench aforesaid by our writ, of one messuage, &c. in B. and hath proceeded to the taking of the proper inquest, and day was given to the parties from Easter day in fifteen days last past, at which day he the said I. caused himself to be essoined, and that essoin was adjourned until fifteen days of the Holy Trinity then next following, and the aforesaid W. and P. his attorney, by collusion before had between them, contriving to disinherit the aforesaid I. of the tenement aforesaid, caused S. of T. servant of the said W. of B. and W. of P. to be recorded attornies for him the said I. without his knowledge and a writ of attorney to be put on the files of writs, and a certain challenge of the abovesaid essoin, in fifteen days of Easter, in the bench aforesaid, and that because the aforesaid I. who had his attorney in the same plea, did not assert the aforesaid essoin to be cast, that at the said fifteen days of the Holy Trinity seisin of the tenement aforesaid stood adjudged to the same W. of B. by the consideration of the court, because the attorney of the aforesaid I. was not essoined at the said fifteen days of Easter, in deceit of our court aforesaid, and to the great damage and manifest disherison of the said I. whereupon the same I. hath besought us by his petition exhibited before us and

(b) See disceit against one who cast an essoin of the king's service, and the tenant. 12 H. 4. 24.

our council in our parliament, that we will provide him a remedy in this behalf, and because the aforesaid W. of B. speaking before you in the bench aforesaid touching the premisses in this behalf, hath acknowledged these things, as it is said: we command you, that having heard the complaint of him the said I. upon the premisses, and having called before you as well the aforesaid W. of B. and W. of P. as S. of F. and having heard the reasons of both parties, if it shall appear to you, by inquest thereon to be taken, or by the acknowledgment of them the said W. W. and S. or any of them, that I. hath lost his tenement aforesaid by the collusion aforesaid, as it is said, then that you cause to be done, as of right should be done, complete justice, as well for us as the aforesaid I. as well touching the deceit and collusion aforesaid, as touching the recovery to be had of the tenement aforesaid. *Witness, &c.*

K If a notary or other person of covin counterfeit the seal of any parson or vicar, and forge letters of resignation of his parsonage or vicarage, in the name of the parson or vicar of his benefice, he shall thereupon have a writ of disceit, and the writ is in the Register. But whether by that he shall be restored unto his benefice, *quære*; it seemeth not, because the removing of him is a spiritual act.

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A If two several men come before the mayor of the staple, or before other mayor of a town, and there one acknowledge unto another one hundred pounds in the name of another man, affirming him to be such a person, which in truth he is not; for which the other person is troubled, and sued upon the statute, and taken in execution, &c. he shall have a writ of disceit against the two persons, &c. and shall recover damages against them.

B And so if a man be bounden unto a prior by a statute-merchant in forty pounds, to be paid at a certain day, at which day he pay the money unto the prior, &c. and afterwards another person in the prior's name cause the statute to be certified in the chancery, and sue execution thereupon, the prior not knowing thereof, he who was bounden, and hath paid the money, shall have a writ of disceit against the prior and those who sued the execution in his name.

If

Escheator.

If the escheator, by virtue of a writ directed to him (a) C
 seize into the king's hands the lands of any person who
 holdeth of the king in chief, by which the king commits
 the wardship of those lands unto another, who grants
 them over unto another during the nonage of the heir:
 now if the under-escheator of his own authority return
 another officer without inquest, &c. and disturb the
 possession of the second grantee, the second grantee shall
 have a writ of disceit against the under-escheator: and so
 if the escheator of his own authority have so done with-
 out taking any inquest, &c. according to the course of
 the law; and these writs are in the Register.

And thereby it appeareth, that an escheator may have
 an under-escheator as well as the sheriff may have an
 under-sheriff.

And also it appeareth, that an escheator shall be punish- D
 ed, although he be an officer of record, if he return any
 office, *virtute officii*, when he hath not taken any inquest
 to inquire of it: and the process in the writ of disceit is
 attachment and *distringas*.

Writ de Parco fracto.

A Writ of *parco fracto* lieth where a man distrains E
 cattle for damage-feasant, or for rent or service,
 and puts them into the common pound, or into another
 pound or place, which shall be said to be a lawful pound;
 and he who hath property in the cattle, or other person
 taketh the cattle out of the said pound, and driveth them

(a) See 9 H. 6. 6. an office found
 before the escheator *virtute brevis*:
 That one A. died seised of the moiety
 of the manor of D. and that B. is his
 heir, and the escheator returns the
 office, that A. died seised of the whole
 manor; and held, 1. That B. may
 have an action on the case against the
 escheator for this false return; for the

commission does not make him a
 judge, he is only an officer. But an
 action on the case does not lie against
 a judge of record. 2. Seeing the
 office found him seised of a moiety
 only, his returning that he died seised
 of the whole, is sufficient to give the
 action: and yet if the king has a
 moiety, he shall have the whole.

where

where he pleaseth: he who distraineth, &c. shall have the writ *de parco fracto*.

If a man send his servant to distrain for rent or services, and the servant distrain the cattle, and impound them, and a stranger take them out of the pound, the master shall have the writ *de parco fracto*, and not the servant, for it is the master's pound.

If a man distrain for rent or services, or for damage-feasant, and put the cattle in the land or close of a friend with his licence, and he who owneth the cattle take them out of the said close, he who distraineth them shall have the writ *de parco fracto*, and not he whose close it is: for who owneth the close, ought to have an action of *quare clausum fregit*, &c. for that it is not his pound, but the pound of him who distraineth the cattle; and the form of the writ is,

5 H. 7. 9.
It is a pound as well as if it were in his several.
Fairf. contra.
33 H. 8. pl. 56.

F *The king to the sheriff of Lincolnshire, greeting: If A. &c. then put, &c. B. to shew wherefore, whereas the said A. took certain beasts in his damage at N. (or thus, the beasts of the aforesaid B.) and impounded them there, according to the law and custom of our realm, the aforesaid B. with force and arms broke that pound, and took and led away the beasts aforesaid, and other wrongs to him did, to the great damage, &c.*

And note, That this writ is *vi & armis*, and he shall not shew in the writ what kind of cattle they are, nor to whom the property of the cattle doth appertain, unless he choose to do so.

G And if a man send his servant to distrain for rent or services, or for damage-feasant, then the form of the writ is such:

To shew wherefore, whereas the said A. caused a certain ox (or certain beasts) to be taken in his damage at N. by B. his servant, and he the said B. there impounded that ox (or thus, those beasts) according to the law and custom of our realm of England, he the said C. with force and arms broke that pound, &c. Or thus for an abbot; To shew wherefore, whereas the said abbot, in his house in the suburbs of Lincoln, by friar I. keeper of our cell of Saint Mary Magdalen without Lincoln, certain beasts, &c. Otherwise for a default

in the lord's court; *Wherefore, whereas the said A. in his fee at N. caused to be taken by his servant the beasts of the aforesaid B. for a certain default which the same B. made in the court of him the said A. against E. in a plaint which was in the same court between, &c. by consideration of the said court, and the said A. impounded those beasts according to, &c. the aforesaid B. with force and arms, &c.*

If a man distrain for amercement in a hundred, and, H impound the cattle, and the other take them out, the writ shall be,

Wherefore, whereas the said A. by B. and C. his bailiffs of the hundred of N. caused to be taken certain labouring beasts of him the said E. at S. within the precinct of the hundred aforesaid for a certain amercement, in which the said F. was amerced in the same hundred, to be levied to the use of the said A. and the said B. and C. impounded those beasts, &c.

And in this writ he ought to shew, that the property of the cattle were in him who was amerced, because he cannot distrain the cattle of other men for this amercement; but for rent or service it is otherwise. For the party may distrain the cattle there levant and couchant upon the lands (a).

If the queen distrain for a debt or amercement due unto her, and impound the cattle, and a stranger break the pound, and take them out, then she shall have a writ, and the writ shall be such:

The king to the sheriff of S. greeting: put by gages, &c. P. of E. and C. of D. that they be, &c. to answer as well to us as Ann Queen of England, wherefore, whereas W. of R. bailiff of the liberty of the said queen of the hundred of C. (in which the said queen, as in the rest of her lands and tenements granted to her by us, hath the return of all our writs,) by virtue of the return of a certain writ made by him for you within the liberty aforesaid, as it belonged to the said W. by reason of his office,) for a certain debt, to be levied to the use of the said queen upon the said P. by summons of our exchequer, took the

41 Ed. 3. 26.
47 Ed. 3. 13.
12 H. 6. 15.
1 Ro. Abr. 669.
Ow. 146.

[101]

(a) See 10 H. 7. 21. 15 H. 7. 19. 6 Ed. 4. 8. contr. 4 Ed. 3. 35. contr.

beasts of the said P. at B. and impounded them there, according to the law and custom of our realm, the aforesaid P. and C. with force and arms broke that pound, and took and led away the aforesaid beasts, and committed other wrongs there, in contempt of us, and to the great damage of the said queen, and against our peace, &c.

A And when the queen sueth any writ, the writ shall not say, &c. *Si Anna Regina Angliæ fecerit te securum*, &c. for she shall not (b) find sureties as a common person shall do, for she shall not be amerced, as appeareth by the writ before. 18 Ed. 3. 21.
Lit. 133.

B If the husband distrain for rent or services which he hath in right of his wife, and a stranger take them out of the pound, the husband shall have the writ *de parco fracto* in his own name; but yet it seemeth he may sue the same in his name, and in the name of his wife, and join the wife with him; *tamen quære*. (*). 15 Ed. 4. 9.

Writ of Rescous.

C THE writ of rescous lieth where a man distraineth for rent or services, or for damage-feasant, or would impark or impound the cattle, and the other party doth rescue them, or take (a) them from him, then he shall have this writ of rescous; and the writ is such: 6 Mod. 216.
3 Bl. Comm.
146.
Co. Litt. 16c.
b. 161. a.

D The king to the sheriff, &c. If A. shall make you secure, &c. then put, &c. to shew wherefore, whereas he the said A. took in his fee at S. certain beasts; or thus, certain beasts of the said B. and would have impounded them there according to the law and custom of our realm of England, the aforesaid B. with force and arms rescued the beasts aforesaid, (b) and

(b) And so it is of an infant, 3 Aff. 25.

* In *parco fracto*, the plaintiff shall have judgement, though he shew no title to make the distress. Lord Raym. 104. 1 Salk. 247.

(a) Note; One may have one writ of rescous for rescuing of several

distresses taken for several tenures. 3 H. 6. 52. adjudged.

(b) Note; He ought to count for what rent or services, &c. he took them, and therefore he ought to count of the terms of payment. 8 H. 4. 1.
Rast. Entr. 580.

other wrongs, &c. Or thus; *Wherefore, whereas the said A. caused to be taken certain beasts by C. his servant in his fee at S. for customs and services due to him; or thus, caused to be taken a certain cart of him the said B. and the said C. would have carried that cart unto the manor of the said A. of S. according to, &c. the said B. with force and arms made an assault upon him the said C. and the said cart, &c. took away from him, &c.*

And so it appeareth he may join in the writ of rescous assault and battery of his servant.

And if he distrain cattle, and other dead chattels, then E the writ shall be,

To shew wherefore, whereas he the said A. took the beasts and chattels of the aforesaid B. in his fee at S. for customs and services due to him, and would have impounded those beasts, and detained the chattels aforesaid in the name of a distress, according to the law and custom of our realm of England, the said C. (c) rescued those beasts, and took away from him the said A. the chattels aforesaid, and other wrongs, &c.

And if he distrain for a rent-charge, the writ is such :

Wherefore, whereas he the said A. in a certain tenement of him the said B. at N. bound for a certain yearly rent by a certain writing obligatory of him the said B. charged with the distress of the said A. took certain chattels of the said B. for the rent aforesaid, being in arrear, and would have there detained them in the name of a distress, according to the law, &c. the aforesaid B. took away from him the chattels aforesaid, &c.

And note, That if a man send his servant to distrain F for rent or service, or damage-feasant, and rescous be made upon the servant, the master shall have the writ of rescous, and not the servant; for the wrong is done unto him who ought to have the rent or service, or is damaged, &c.

(c) Without shewing in what place the rescue was, for it shall be intended in the place where taken. 30 Ed. 3.

15. But it shall be shewn in the count. 10 Ed. 4. 15.

If a collector or sub-collector distrain for fifteens, and rescous be made, he shall have the writ of rescous; and the writ shall be such:

G *If W. of S. the sub-collector of the tenths of the town of S. last granted to us by the citizens and burgessees of our realm, &c. shall make you secure, &c. then put, B. &c. to answer as well to us as the aforesaid W. wherefore, whereas the same W. took certain chattels of him the said B. for a certain sum of money assessed upon account of the tenths aforesaid, and in our name would have detained those chattels in the name of a distress, the aforesaid B. there assaulted the said W. and beat him, and took away from him those chattels, &c. and other wrongs, &c. in contempt and prejudice of us, and to the great damage of the said W. and against our peace, &c.*

And if the bailiffs or officers arrest certain persons, and others rescue them from the officers, then he who caused them to be arrested, shall have the writ of rescous; and the writ shall be such:

Wherefore, whereas the said prior by the charter of lord Edward, &c. which we have inspected, ought to have at W. his free court of all his men, as well burgessees as others, and of all pleas and complaints and attachments whatsoever happening, together with prizes and all other things belonging to his men; and the same prior caused to be attached by B. his bailiff at F. R. and M. the men of him the said prior, for divers trespasses by them done at T. within the liberty of the aforesaid prior (as it is said) against our peace, whereupon hue and cry was there levied, and the said prior would, according to law and custom, have there detained them the said R. and M. to undergo justice in this behalf in the court of the said prior, the aforesaid B. and L. with force and arms took the aforesaid R. and M. not justified concerning the said trespasses out of the custody of him the said B. and permitted them to go where they would, and other wrongs, &c. to the great damage of him the said prior, and to the manifest hurt of his liberty, and against our peace, &c.

And note, That if the bailiff or sheriff, or other officer Infra G. of the king, arrest a man, or distrain him for debt, or other service due to the king, and rescous is made, then

the bailiff or other officer shall have the writ of rescous in his own name, and not the king's, and the writ shall be such :

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If T. bailiff of the hundred of F. shall make you secure, &c. then put, &c. to answer as well to us as the aforesaid bailiff wherefore, whereas the same bailiff, according to the duty of his office, took W. (whom we commanded to be taken by our sheriff of the county aforesaid by our writ of judgment to him directed) at K. by virtue of our mandate aforesaid, and would have led him unto our castle of R. there to remain in our prison, the aforesaid R. and S. with force and arms rescued him the said W. at the town of K. and other wrongs, &c. in contempt of us, and to the great damage of the aforesaid bailiff, and against our peace : and have, &c.

And if the bailiff would attach any person, and he refuse himself, and will not obey the arrest, then the writ shall be such : A

If H. of R. bailiff of our town of S. shall make you secure, &c. then put B. &c. wherefore, whereas he the said H. according to the duty of his office, attached the aforesaid B. for a certain hue and cry levied upon him by W. of S. at C. on the complaint of the aforesaid W. according to the law and custom of our realm ; the aforesaid B. not permitting justice to be done to himself, with force and arms broke the attachment aforesaid, and there made an assault upon him the said H. &c.

And if the sheriff send unto the bailiff of the liberty to B levy fines and amercements for the king, and the bailiff distrain certain cattle, and rescous be made : now the lord of the liberty shall have a writ of rescous of the rescous done to the bailiff, and for the battery and assault made upon him, and for the loss of his service, and all in one writ.

Post. G.

If the king's bailiff distrains for rent, and rescous is C made, the bailiff shall have the writ of rescous, and not the king.

³ Wooddes Syft.
View 24^o.

And if a man sue forth an execution, and have a *capias* directed to the sheriff to arrest the party, and the sheriff make his warrant to the bailiff of the king's liberty where the

the

the party dwelleth, to arrest him, by which the bailiff (a) arrests him, and others rescue him from the bailiff, he who sued forth the writ of execution, shall have the writ of rescous against him that rescued him, as appeareth by the Register; but yet it seems reasonable that the bailiff have a writ of rescous in such case; for some say the bailiff shall be chargeable to him, who sued forth the *capias*, &c. and for the arrest: *tamen quære*.

D And it appeareth by the Register, That if a writ be directed unto the sheriff, to levy the expences of the knights at the parliament, and the sheriff make his warrant unto the bailiff of the liberty of the bishop of *Ely*, to levy the sum assessed, &c. for which the bailiff by his under bailiff taketh certain cattle and would impound them, and other persons rescue the cattle and beat the under-bailiff, that the bailiff shall have the writ of rescous against them; and there it seemeth that the knights who should have the money, shall not have a writ of rescous for the same rescous, because it is not a duty unto them by any person certain, but to be levied of the inhabitants of the towns.

E And if the lord distrain his tenant's cattle, and a stranger's cattle, for rent or service behind, when there is not any rent or service behind, the stranger may rescue his own cattle, but not the tenant's, as it seemeth. And that as it seemeth by the statute of *Marlbridge*, cap. 3. which willeth, *Non ideo puniatur dominus per redemptionem*, yet the opinion of *Thorpe M.* 31 *Ed.* 3. is contrary; for he saith, the stranger may rescue as well the tenant's cattle as his own. *Quære (b)*.

39 *Ed.* 3. 35.

F And rescous is not, but where a man hath the possession of the cattle, or the thing of which the rescous is supposed

Vi. Lit. 52.
9 *H.* 7. 4.

(a) Note; The sheriff may return a rescue, and at that return the party may have his answer. 3 *H.* 7. 11. *Dyer* 212. and *Westm.* 2. c. 40. And yet if the rescous be at any time after the arrest, the sheriff shall be charged in debt on an escape, if it were not made by the king's enemies; and the sheriff shall have this remedy

over by action on the case. *Dyer* 241.

(b) And note 4 *Ed.* 6. *Distress* 74. *contr.* See 6 *Ed.* 4. 11. 5 *Ed.* 4. 10, 11. 19 *H.* 7. 48 *Ed.* 3. 33. 3 *H.* 4. 22. 22 *H.* 6. 37. *contra.* 29 *Ed.* 3. 35. 4 *Co.* 11. b. *Bevill's* Case.

to be made: for if one come to arrest a man, or to distrain, and he be prevented from doing it, he shall not have a writ of rescous, but an action on the case (c).

And the king shall not have the writ for a rescous done to his officer, *qd' vide P. 20 Ed. 3.* but he may cause him to be indicted for the same. *Vid. supra C.* G

Audita Querela.

THIS (a) writ of *audita querela* lieth as well upon H matter in fact, as upon matter in writing, as after appears. And this writ shall be directed unto the justices of the common pleas or king's bench, and lieth where *A.* and *B.* come before the mayor, &c. and *B.* doth acknowledge himself to be bounden in one hundred pounds to *A.* in the name of *C.* before the mayor, and affirmeth his name is *C.* and afterwards *C.* is arrested by force of this bond and statute, and taken in execution: now *C.* shall have *audita querela* against *A.* and *B.* and the form is such:

The king to his justices of the bench, greeting: We have received the complaint of C. importing that A. and B. by collusion before had between them at W. fraudulently contriving to impose upon our court, and to oppress the aforesaid C. lately appearing before R. mayor of our town of Southampton, and R. clerk, deputed to take recognizance of debts at S. asserted upon their corporal oath taken by them for that purpose, that he the said B. was the said C. by which he the said B. under the name of the said C. acknowledged himself to owe to the aforesaid A. one hundred pounds, to be paid at a certain time now past, before the said mayor and clerk, according to the form of the statute for merchants lately set forth at Acton Burnel, and afterwards him the said C. because he paid not

(c) See 21 H. 7. 40. 44 Ed. 20.

(a) Note a diversity, where the discharge comes by determination of the estate, there the conusor needs no *audita querela*. For if tenant in tail

acknowledges a statute, which is extended, and he dies, his issue may avoid it by entry. 38 Aff. 5. 43 Aff. 18.

the said one hundred pounds to the said A. at the time aforesaid, falsely and maliciously procured to be taken by the aforesaid mayor, and kept safely in our prison, until he should fully satisfy the said A. of the said one hundred pounds, to the great damage of him the said C. and in manifest deceit of our court; whereupon the said C. hath besought us, that we would administer to him a fit remedy: We therefore command you, that having heard the complaints of him the said C. in this behalf, and having called before you the aforesaid A. and B. and the said mayor and clerk, and having heard the reasons of the several parties, touching the falsity, malice and deceit aforesaid, you cause to be done to the said C. full and speedy justice, as of right and according to the law and custom of our realm you shall see ought to be done. Witness, &c.

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A If a man lease lands unto A. for life, and afterwards by fine grant the reversion unto B. in fee, and die, and the heir of the recognizor, and one L. by covin betwixt them (b) sue a *præcipe in capite* against the said A. supposing the land to be holden of the king, whereas it is not holden of the king, but of another person: and in this *præcipe in capite* they cause one F. to appear as attorney for A. and to join the mise in the said writ; and afterwards the attorney by covin make default, for which judgment is given against A.; now upon the same matter he shall have an *audita querela* directed unto the justices of the common

Supra 98. M.

(b) See 17 Ed. 3. 60. A. tenant for life, remainder to B. in tail, C. by covin between him and A. brings a formedon against A. and B. supposing them jointenants, and one D. answers as attorney for B. and process is continued until they make default after issue joined, whereupon judgment final is given, and B. shews this, and prays that it be entred, for that it is within the year: and it was entred on record. 2. And also agreed, That he shall have restitution; but

A. shall not, for he hath forfeited his estate. 3. That he shall not have restitution on a general bill of disceit, but ought to sue an *audita querela* in chancery on his case, *tam super restitutione ten'ti quam pro deceptione punienda*.* 17 Ed. 3. 46. and so note restitution at least, where the demandant was party to the disceit. See 21 Ed. 3. 45. 19 H. 6. 44. 1 H. 4. 5. Stat. 21 Jac. 1. cap. —. 17 Ed. 3. 76. Register 114, 115.

* Supra 96. D.

pleas, commanding them to proceed as well for the restitution of the land, as upon the disceits, and to do speedy justice, as of right according unto the custom of the realm ought to be done; and the writ is such:

The king to his justices of the bench, greeting: A. hath shewed unto us, that whereas he lately held the manor of C. with the appurtenances, in the county of L. for the term of his life, of the demise of I. and H. son and heir of the aforesaid I. granted the manor aforesaid to T. of S. and the heirs of the body of him the said T. issuing after the death of the said A. (as it is said) by a fine levied thereof in our court before our justices of the bench, B. (son and heir of the aforesaid H.) and L. by collusion before had between them, contriving to amove the said A. from the manor aforesaid, and to exclude the aforesaid T. from the reversion of the manor aforesaid, have obtained in our chancery our writ in the name of the said B. against the said A. and T. (which is called a præcipe in capite) of the manor aforesaid, to our sheriff of Leicestershire, returnable at a certain day now past, as if the said manor were holden of us in chief, whereas it is not holden of us, and our said writ was returned by the sheriff aforesaid, that the said A. and T. were summoned to be before you at the day aforesaid, according to the form of the said writ, and falsely and maliciously procured a certain person unknown, who asserted himself to be named R. of S. to appear before you in the bench aforesaid, as attorney for the said A. and T. to gain or lose in the plea aforesaid; they the said A. and T. being wholly ignorant of the obtaining of the writ, of the summons, and of the making the attorney aforesaid in their name, as is premised; and the said attorney appearing before you at the same day, put himself upon our great assise, and prayed recognition to be made, whether they the said A. and T. had greater right to hold the said manor with the appurtenances, as they have holden it, or the aforesaid B. to have the said manor as he hath demanded it, by which, through the default which they the said A. and T. afterwards made in the same court, it was considered by you there, that the aforesaid B. should recover his seisin of the manor aforesaid with the appurtenances against the aforesaid A. and T. to hold to him the said B. and his heirs quit of the said

said A. and T. and their heirs for ever; by virtue of which consideration the aforesaid A. is perpetually amoved from his manor aforesaid with the appurtenances, to the great damage of him the said A. and the manifest deceit of our court; whereupon the aforesaid A. hath besought us to administer to him a fit remedy: we being unwilling that such collusion, malice and deceit should pass unpunished, command you, that having heard the complaint of him the said A. in this behalf, and having called before you the aforesaid B. and L. and others whom you shall see fit to be called in this matter, and having heard the reasons of the several parties, you further cause to be done full and speedy justice to the aforesaid A. (a) as well upon the restitution and recovery of the said manor, as upon the collusion, malice and deceit aforesaid, as of right and according to the law and custom of our realm you shall see ought to be done. Witness, &c.

And by this writ it seemeth the justices ought to make void the recovery, if they find the deceit, &c. yet it seemeth they may not so do, 17 Ed. 3. 60. 21 Ed. 3. Supra 98. M. 45. 19 H. 6. 44.

B (a) If a man be bound in a statute-merchant, and afterwards make a feoffment of parcel of his lands unto another man, and of other parcel unto another, and the recognizee sue execution upon the statute, and have execution against one feoffee, that feoffee shall have an *audita querela* (b) against the other feoffee, to shew cause why he should

9 H. 4. 4.
32 Ed. 3.
Execut. 127.
45 Ed. 3. 51.
16 Eliz.
Dyer 3. 37.
4 Ed. 3. 522.
& 3 Eliz.
Dyer 193, 194.
Whaley's Case.

(a) See 41 Ed. 3. Execution 37. 16 H. 7. 16. 47 Ed. 3. 4. 13 H. 7. 22. 45 Ed. 3. 17.

(a) See 33 Ed. 3. Audita Querela 38. 11 Ed. 3. Brief 266. 29 Ed. 3. 7.

(b) See 13 Ed. 3. Execution 127. and against the conusee, and thereby he shall be restored to the issues, and the execution defeated. 45 Ed. 3. 17. 29 Ed. 3. 7. where there are two conusors, and the lands of one only are delivered, who sues a writ to the sheriff to deliver the lands, &c.

of the other in discharge and aid of the former, who returns *non est inventus*, and that none came on the part of the conusee; and now he prays remedy, and has a *scire facias* against the conusee to take his suit against the other; and if the conusee knows not what to say, or does not appear, he shall have execution against the other, or the party shall be discharged, having regard to his part or portion of the debt. Dyer 193. Gascoigne and Whaley.

If the conusor enfeoffs the conusee of

should not have execution of his lands, as of the lands which himself hath.

If a man be bounden in a statute-merchant, and certain indentures of defeasance be made of the said statute, and afterwards the conusee arrest the recognizor, and imprison him, and take the defeasance from him, and then sue execution upon the statute, the recognizor shall have an *audita querela* against him upon the whole matter. C

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40 Aff. 23.

44 Aff. 15.

Holt.

Br. Audita

Querela 43.

9 H. 5. 1.

Br. Audita Querela 16.

36 H. 6. 24.

21 H. 7. 83. 3 H. 4. Br. Audita Querela 37. Fitz. Release 5. Release of all actions is not sufficient matter to have *audita querela*.

If at the *nisi prius* in trespass it be found for the plaintiff, and damages assessed, and before the day in bank the plaintiff release unto the defendant all actions and demands, and afterwards (c) pray judgment, and sue execution thereupon; the defendant upon that release shall have an *audita querela*. A

43 Ed. 3. 5.

15 H. 8. 5.

V. 2 & 3 Eliz.

Dyer 193.

43 Ed. 3. 38.

Finchden.

And the heir of the recognizee may sue an *audita querela*, if he have matter in writing to discharge the execution. B

(a) If a man be bound in a statute-merchant or staple, and afterwards pay the money according to the statute, C

of part of his land, and his son of the residue, and dies, and the conusee sues execution against the son, the son may have an *audita querela*, and discharge the execution *eadem causa*, but no costs or damages. So if the lands of one of the feoffees only are delivered in execution, he may have an *audita querela*, and a *scire facias* against the other, and it shall be no plea in abatement of the writ, that there are other feoffees to be contributory: for he is bound at his peril to take notice of all such as are contributory.

Note the diversity: If the conusor of a statute-merchant enfeoffs divers severally, and the lands of one only is taken in execution, he shall have an *audita querela*, against the conusee, to make the others contributory, and

the writ shall be directed to the justices *de Banco*; but of a statute-staple, it shall be in chancery by *audita querela* directed to the chancellor, or by a *scire facias* directed to the sheriff, *Quare tenementa extensa una cum proficuis medio tempore*, &c. Dyer 331, 332.

(c) For he cannot plead this at the day in bank, and before judgment he cannot have an *audita querela* to stay judgment. 9 H. 5. 1. See the case of *Lovell v. Eastaff*, 3 Term Rep. K. B. 554.

(a) *Contra*, if the conusor himself comes into chancery, and prays a re-extent, and it seems this writ lies, if the statute be delivered instead of an acquittance, but is not cancelled. 43 Aff. 18.

and have the statute delivered unto him, and cancel the same, and afterwards the recognizee forged a new statute in the name of the recognizor, the recognizor upon the statute cancelled shall have an *audita querela*.

- D (b) If a statute-merchant or staple be made by one unto another, and delivered into the hand of a stranger to deliver upon conditions performed, and the stranger deliver the statute before the conditions performed, and the conusee sue execution thereupon, the recognizor shall have an *audita querela*.

43 Ed. 3. 27.
cont. 12 H. 4.
6. Calp. cont.
Br. Audita
Querela p. 15.
acc.

- E If a man sue forth an execution upon a statute, and have execution, and afterwards grant over his estate, the recognizor shall have an *audita querela* against the grantee without naming him who sued the execution, if he have matter in writing for to sue, &c.

12 H. 4. 15 and
16. Frankford.

- F A man may sue an *audita querela* against the recognizee, because he hath purchased a manor unto which the recognizee is a villain regardant, and yet he may enter and seize the recognizee without such suit.

41 Ed. 3.
Audita Querela
18.

- G (c) And a stranger who made not the recognizance, nor was tenant of the land at the time of suing forth of

the
46 Ed. 3. 23.
Fulthorp.
17 Aff. 24.
Audita Quer.
20. 10 Ed. 3.

25. Error 71. the feoffee had error.

(b) See 7 H. 6. 42. A. makes a statute-staple to B. and delivers it to C. to be re-delivered on condition, &c. B. recovers by an erroneous judgment, where A. was warned, and the deed is delivered to him by C. B. sues execution, and A. brings error. Resolved, 1. That pending the errors and execution, he cannot have a *superfedeas*. 2. If A. reverses the judgment, this does not defeat the execution had on the statute, but it seems he is put to his *audita querela*.

(c) If execution be awarded against the feoffee, he shall have an *audita querela*, on a matter of discharge, made either before the feoffment, or after. 7 Ed. 3. 27. John S——

case. Where he shall have a writ of error, see 17 Aff. 24. *Chester's case*; but if the execution be made, and after the extent, the conusor makes a feoffment, it seems the conusee shall not have an *audita querela*, on a cause or matter of discharge made before; as if after the extent, and before the feoffment, or before the extent, the conusee will acquit the debt, and so seemed the better opinion. *Micb.* 44, 55 *Eliz.* In chancery in an *audita querela* brought by *Harden and Vavisor*, and their wives, against *Smith*, executor of *Riggs*. *Moor, Case* 737. But on a matter happening after the feoffment, he shall have an *audita querela*, as on a release, &c. (and so here G.) and 17 Aff. 24. a feme

the execution, shall have an *audita querela*, if he have matter of discharge in writing. *Vide* 11 Ed. 3. Litt. Aff. and there it is said the same is given by the statute. The feoffee shall not have a writ of error, &c. Nor the feoffee of the conusor of part of the lands shall not have an *audita querela* until his lands be taken in execution.

feme shall have a *scire facias ad computand'*; and note, 1. For whom it lies. 2. Against whom it lies. 3. When it lies. 4. The effect of the writ. It lies by the grantee of a reversion, with attornment, &c. and there he shall have account *ab initio*. 6 Ed. 3. 53. *I. de Charlton's case*. 25 Ed. 3. 53. *John Venner's case*. So if one acknowledges a statute, and afterwards acknowledges a second statute, the second conusee shall have a *scire facias* against the first, to receive the monies which are to be levied, if the tenant of the freehold will not sue. 38 Ed. 3. 12.

2. If the conusee has assigned but a part of his estate, the *scire facias* shall be brought against the conusee only, and not the lessor; *quære*. But if he assigns the whole, and the assignee levies the whole, or the plaintiff will pay the residue, the writ lies against the assignee alone, and he shall retake (or repay) the monies; but if he has levied the whole and afterwards assigns, the writ lies against both. 50 Ed. 3. 46 or 16. 38 Ed. 3. 12. 21 Ed. 3. 1. 46 Ed. 3. *Scire facias* 134. 15 Ed. 3. *Respond.* 3. But one of them may answer without his companion, and yet the conusee may release, notwithstanding the assignment. *Vide ibid.* See also 17 Aff. 52. 9 Ed. 4. 13. 12 H. 8. 8. 18 Ed. 3. 25. *contr.* 17 Aff. pl. 24. *contr.* 25 Aff. 8. 17 Ed. 3. 43. 4 H. 6. 72. 21 Ed. 3. 46. *contr.* See 17 Ed. 3. 49.

And note; This writ lies in case of a statute after the debt, and damages

levied by the casual profits, by course of time, or by render of the money, and he shall recover his land. See 47 Ed. 3. 11. 32 Ed. 3. *Scire facias* 101. 46 Ed. 3. *Scire facias* 134. *Vide Registr. Judic.* 73. but not to re-have the land, and also answer for the waste. 21 Ed. 3. 26. 30. For it seems he may have a writ of waste, &c. *Vide F. N. B.* 53. H. acc. *quære*. And note; If by the casual profits he has levied more than his debt and damages, the surplus shall be paid to him in reversion, if it was levied in his time, or at least as much as was so levied over. 21 Ed. 3. 30. And the tenant shall account to the grantee *ab initio*; for perhaps the term was incurred before the purchase of the reversion. 6 Ed. 3. 63. But he shall not account according to the true yearly value, but according to the extent; for if the lands are extended too low, the other may have a re-extent at the first day in court. 22 Aff. 44. *Extent* 3. But afterwards, he has no remedy but to pay the money. See 19 Ed. 3. *Extent* 12. *per Green.* 32 Ed. 3. *Scire facias* 101. And therefore on a *scire facias ad computandum*, he ought to shew what the casual profits are, *ibid.* yet see 20 Ed. 3. *Extent* 18. *contr. per Wilby.* And note; The writ is sometimes *ad computandum*, against the opinion in 22 Aff. 44. and sometimes *ad computand'*, and to receive the residue of the money, and to re-have the land.

H If a man sue *audita querela* against the conusee, and produce a statute cancelled; and say that the same was delivered (a) to him in lieu of acquittance, the recognizee may shew the true statute, and state that the cancelled statute which was produced was forged by him, and thereupon he shall have a writ unto the justices in the nature of *audita querela*, commanding them that they send for the mayor and the clerk, and for the parties, and do right; and the examination of the mayor and clerk shall try and end the matter; *quod vide M. 11 Ed. 1.*

18 Ed. 3. 36.
Audita Querela
9. The conusor
must shew the
statute, other-
wise he shall not
have the plea.

I Upon a recovery of a debt, if one sue a *scire facias*, and the sheriff return *nihil*, by which an execution is awarded, the defendant shall have *audita querela*, if he have a release or acquittance, because he was not warned: but if the sheriff have returned him warned, he shall not have *audita querela* upon such release, &c. because he might have pleaded the same upon the return of the *scire facias* (b).

48 Ed. 3. 20.
12 H. 4. 4.
per Hungerf.
21 Ed. 3. 15.
Hil. Audita
Querela 18.
1 Will. 98.

K (a) And if an infant bind himself in a statute-merchant or staple, he shall have an *audita querela* during his non-age, to avoid the statute, and afterwards he shall have an

6 Ed. 7. Eliz.
Dyer 232.
Infra 105. D.

(a) And in such case execution shall be awarded, if the conusor does not shew the true statute. 18 Ed. 3. 36. See 17 Ed. 3. 49. 21 Ed. 3. 46. *contr.*

(b) See the case (18 Ed. 3. 36.) where it is also held, that if a *venire facias* on an *audita querela* be not sealed, yet the party may appear and plead. 21 Ed. 3. 13. See a *scire facias* by a bishop against an executor; the sheriff returns [*clericus & beneficiatus, &c.*] Whereupon a *fi. facias* issued to the ordinary; (*note*; He was not charged as executor,) and he sequesters; the executor sues an *audita querela*; and resolved, 1. That though the executor had a co-executor, yet if he alone be grieved, he alone may have this suit. 2. That this suit lies, notwithstanding the *scire facias*, 21 Ed. 3. 48. If both plaintiff and defendant make default

at the *scire facias*, yet *audita querela* lies on a release made before; *contr.* if the defendant makes default, and the plaintiff appears. 24 Ed. 3. 24. See 8 H. 6. 1. per Martyn. 12 H. 7. Kelw. 24. See Dyer 203. an *audita querela* after judgment against the plaintiff, for the executors of a testament, which was afterwards annulled. See 48 Ed. 3. 20.

(a) *Note*: It is necessary he bring it while under age; but he shall not avoid it by plea, saying he was within age generally. 17 Ed. 3. 76. Dyer 132. 13 Ed. 3. Audita Querela 26, 27. 18 Ed. 3. 5. 29. 6 Ed. 3. 29. See Kelw. 10. per Keb. Quere 26, and 6 El. C. B. Harri-son and Worsley's case, judgment reversed *durante minoritate*. Vide infra C. Dyer 232. b. 13 Ed. 3. 182. Bac. Abr. Tit. Audita Querela A.

audita

Rule that the writ doth not lie after he cometh of full age.

13 Ed. 3. 2.

18 Ed. 3. 8.

15 Ed. 4. 5.

Brin. acc.

20 Ed. 3.

Aud. Quer. 27.

20 Ed. 3.

Aud. Quer. 28.

25 H. 8.

Br. Aud.

Quer. 39.

audita querela after his full age, to avoid the statute upon this matter in fact.

And so if a man make a statute-merchant or staple by L duress, he shall have an *audita querela* to avoid such statute by this imprisonment.

(b) If two be severally bounden in several statutes, and M afterwards the recognizee by one deed release to both of them, if he sue execution against them severally, they shall join in *audita querela* upon that release.

If the recognizor infeoff a stranger of parcel of the N lands, and afterwards infeoff the recognizee of another parcel of the lands, and afterwards the recognizee sue execution against the recognizor and the feoffee; the feoffee shall have an *audita querela* against the recognizee, and discharge his lands, because the recognizee hath discharged his parcel of land which he purchased by his own act (c).

Upon an *audita querela* sued he shall have a *superfedeas* in O the same writ to stay execution, &c. But if he be (d) nonsuit, he may have a new *audita querela*, but then he shall not have a *superfedeas* to stay execution.

And a man shall not have an *audita querela*, supposing P the recognizee will sue execution, but it ought to be alleged in the writ, that he hath *in facto* sued execution.

(e) If a man sue *audita querela* upon a release, and af- Q terwards be nonsuit, he shall not have an *audita querela* upon new (f) matter, *ut dicitur* 43 Ed. 3. But it seemeth the law is otherwise; but he shall not delay execution by a new *audita querela*.

24 Ed. 2. 24.

Br. Aud.

Quer. 22.

9 H. 5. 1.

43 Ed. 3. 28.

Thorp.

24 Ed. 3.

Aud. Quer. 11.

(b) It seems the tenants in common, &c. need not join in an *audita querela*, with the tertenants. *Quære* 20 Ed. 3.

(c) *Vide infra* E. 11 H. 7. 4. 13 H. 7. 42. 7 H. 4. 31. 34 Aff. 15. 5 Ed. 6. (H. 6.) 72.

(d) Note; If the conusee sues divers certificates, and on one of them has a writ returnable in C. B. and the conusor purchases an *audita querela*, and has a writ returnable in B. R.

and the party is taken thereon, he ought to sue a writ to the mayor and clerk, to certify if he has other statutes, and so shall be aided. 29 Aff. 29, viz. *per audit' querel'*, *ibid* 41. See 2 H. 7. 12. 33 Ed. 3. Execution 161. 9 H. 7. 16 H. 7. &c.

(e) See 17 Ed. 3. 27. 43 Ed. 3. 28. 24 Ed. 3. *Audita Querela* 11. and *ibid*. 29.

(f) See 33 Ed. 3. Executors 61.

- R If a man comprize two matters in the *audita querela* to extinguish the execution, yet the writ is good, but the plaintiff shall hold himself to one matter, and the defendant shall answer to that. And variance betwixt the *audita querela* and the record shall abate the writ. But if there is a new *audita querela* sued according to the record, he shall have a *supersedeas* to stay execution, &c. although he had before a *supersedeas* in the other *audita querela*, which was abated. 44 Ed. 3. 36.
24 Ed. 3. 27.
Br. Aud. Quer. 24.
- S If a man sue execution upon a statute-merchant, and have a *capias* returned in the common pleas, if the feoffees or parties will sue an *audita querela*, they ought to sue the same out of the chancery, directed unto the justices of the common pleas. V. 22 H. 6. 56.
- T If a man sue an execution upon a statute-merchant, as executor unto another, the party shall not have an *audita querela*, supposing in the writ that he who hath such execution is not executor. See 29 Ed. 3. 99. 2 R. 3. 8. con. if the testator be living
- V (a) And the process in *audita querela* is *venire facias* and *distringas*, *alias* and *pluries distringas*, and if he return *nihil*, or *non est inventus*, he shall have a *capias* against the defendant. T. 81 Ed. 3. (b). Br. Aud. Quer. 41.
[105]
48 Ed. 3. 1.
He shall not have *capias*, but sicut *alias*.
12 H. 4. 6. and 15.
- A A man recovereth by default in an action of waste, the defendant sueth an *audita querela*, directed unto the justices

(a) The *distringas* may be in the lands and tenements, which he had the day of the writ purchased. 18 Ed. 3. 36. 38 Ed. 3. 1. and before the *distringas* sued, the conusee shall not be ousted. 21 H. 6. 56. See 48 Ed. 3. 1. 31 Ed. 3. *Audita Querela* 24. 20 Ed. 3. *ibid.* 28. 30.

(b) A. enfeoffs B. on condition to re-enfeoff A. and C. his wife for their lives, remainder to D. the daughter (son) of A. and the heirs of his body, and the said B. by collusion between him and E. makes a recognizance of 200 l. to E. and one F. (after the re-enfeoffment as it seems,) A. dies, and C. takes G. to husband, who on this matter sues an *audita querela*; and it

was resolved, 1. That he need not count upon this writ. 2. That though he may have remedy by writ of *disceit*, or conspiracy, yet seeing here is matter of record, which is the ground of the writ, it is good. But 3. for that E. was party to the recognizance, and by the writ is supposed party to the collusion, and this suit is to defeat the recognizance, and not to recover damages; the writ shall abate. 26 Ed. 3. 73. If execution be sued against a feoffee, on a statute acknowledged before the mayor of C. who had no authority to take it, *audita querela* lies. See 29 H. 8. Dyer 35.

out of the chancery, furnishing in the writ that he was not summoned, nor attached, nor distrained; for which the justices grant out of the rolls in the common pleas a writ of disceit against the plaintiff, for that the *audita querela* was but a command to the justices to do right unto the party, &c. *Trin. 19 Ed. 3.* And so they proceed upon the writ of disceit, and not upon the *audita querela*.

(c) If a man be bounden in a recognizance in the B common pleas, and afterwards release unto the party, and then against his release sue execution; in that case he shall come into the common pleas, and sue an *audita querela* thereupon out of the rolls. And so if one recover in the common pleas or king's bench, debt or damages, and afterwards by his deed release the same, and afterwards sue forth execution upon the recovery, the party to whom he released shall have *audita querela* out of the common pleas or king's bench, where the record is. And yet he may have an *audita querela* out of the chancery: and so it shall be sometimes judicial, and sometimes original.

46 Ed. 3. 3.
48 Ed. 3. 12.
47 Ed. 3. 5.
47 Ed. 3. 25.
Ant. K.

And if a man be bounden in a statute-merchant or sta- C ple unto another man, and afterwards the recognizee make a defeasance unto the recognizor; now if the recognizee sue execution upon the statute against the form of the indentures, the recognizor (or his executors, if he be dead) may have an *audita querela* against the recognizee.

Supra 104. K.

And it appeareth in the Register, that a writ of *audita D querela* lieth for an infant who hath acknowledged a statute-merchant or a statute-staple during his nonage, if he be yet within age.

Ant. N.

And another *audita querela* appeareth in the Register for E the feoffee, of parcel of the land which belonged to the recognizor, against the recognizee, because that the recog-

(c) And if the party come in, in custody by a *cepi corpus*, or a *reddidit se*, at the exigent, he shall have a *scire facias* to acknowledge the deed, but not if he offer to appear at the exi-

gent. *Dyer 285.* See a *scire facias* to acknowledge a deed, 33 *Ed. 3. Execution 161.* and *Audita Querela 38.*

nizee

nizee hath purchased other parcel of the lands of the recognizor, &c.

F If a man be arrested and imprisoned upon a statute-merchant, and afterwards the recognizee release unto the recognizor, or he pay the debt, and have acquittance, or pay parcel, and have a release for the residue; then he may come into the chancery, and there find surety, body for body, to be in the chancery at a certain day, and there to pay the money, &c. if he cannot discharge himself by acquittance or release; and thereupon he shall have a writ unto the sheriff of the county where he is confined, reciting that he hath found sureties in the chancery, commanding him to deliver him, if he be there confined in prison for that cause, and for no other cause, and upon that he may have an *alias* and a *pluries*, and attachment against the sheriff, if he will not deliver him, &c. Sureties.

But if a man be arrested and imprisoned upon a statute-staple, and have acquittance or release to discharge himself, then if he will sue an *audita querela* or *scire facias*, to avoid the execution of that statute, he ought to find surety as well to the party, as to the king in the chancery, severally in a certain sum, &c. to sue with effect, and to render his body, or pay the money, &c. otherwise he shall not be delivered out of prison: and the same is by force of the statute of 11 H. 6. cap. 10.

Writ of Attaint.

G THE writ of *attaint* lieth where false verdict is given (a) in a court of record against the plaintiff or defendant, or against the demandant or tenant in a plea real or personal sued by writ or by bill: if the debt or damages exceed forty shillings; then he against whom the verdict passed shall have a writ of attaint, and the writ

3 Bl. Comm.
402.
V. 4 Ma. 1.
Br. Attaint 127.
it lieth not upon
an information.
40 Ed. 3. 11.

(a) See on the statute 23 H. 8. executors or heirs, &c. *Quære Dyer*
cap. — that attaint lies against the 201.

shall be such, if it be in action of trespass in the king's bench.

(b) If S. of L. shall make you secure, &c. then summon, &c. twenty-four lawful knights of the venue of N. that they be before us at B. on the octave of Saint Hilary, ready by oath to recognize whether the jurors by whom a certain inquisition was lately taken before us at B. by our writ between I. and M. his wife, and the aforesaid S. touching a certain (c) trespass to the said M. by the aforesaid S. committed, as it is said, have made a false oath, as the same S. grievously complaining to us hath alledged, and in the mean time that you diligently inquire who were the jurors (d) of the first inquisition, &c. And have them then before our justices aforesaid, &c. or before us, &c. as the case is and lieth (e). H

3 H. 4. 15.

And by the statute of *West. 1. cap. 38.* a man shall have an attaint in plea of land or of freehold or of a thing which toucheth freehold. I

Parl. 21. E. 3.
n. 23.

And by the statute of 1 *Ed. 3. cap. 6.* a man shall have attaint in trespass. K

(b) But if they are at issue on the point of an attaint, it shall be tried by twelve (jurymen.) 21 *Ed. 3. 102.* *Contra* where the defendant pleads a release of the plaintiff, it shall be tried by twenty-four, who are also afterwards to inquire of the false oath, if they find for the plaintiff. 20 *H. 7. Kelw. 55.* *Note*; The visne ought to be of the same place where the issue in the first writ arose. 12 *R. 2. Brief 641. Post. 242. b.*

(c) Although the original writ or suit comprised many points, yet the writ of attaint shall mention only the point on which the false oath was given. *Dyer 141.*

(d) So that properly the jurors are not parties, and therefore where the defendant admits the writ to be good, or is estopped to say it is not good, the petit twelve shall not plead in

abatement, though the writ was purchased pending another, jointenancy or coverture in the plaintiff, 21 *Ed. 3. 16.*, or outlawry in the plaintiff. 2 *H. 7. 7.* But a plea which proves the writ abated *in facto* they may have, as death of the plaintiff or defendant. 18 *H. 8. 5.* Also a thing which excuses the false oath they may plead as a release of actions personal. 21 *Ed. 3. 16. per Thorp.*, or a release or award between the plaintiff and defendant. 13 *Ed. 3. 1. 5.* 35 *H. 6. 30.* 18 *H. 8. 1.* So a release or award between the plaintiff and themselves. 13 *Ed. 4. 1. per Sulliard.* 12 *H. 6. 6.* the petty jury cannot plead *non-tenure*, because it concerns the land; *contra* of coverture.

(e) And the party may have attaint by another writ. See *Ed. 2. Brief 827.*

And

L And by the statute of 5 Ed. 3. cap. 7. in the end of the statute a (*f*) man shall have attaint of trespasss sued by bill without writ before justices of record, if the damages exceed forty shillings. 14 H. 7. 14.
Brian.

M And also a man shall have attaint for the damages, although they be not paid, &c. 14 H. 7. 14.
Fineux.

N And if false verdict pass by writ of *nisi prius*, then the form of the writ is; 34 H. 6. 13.

Ready by oath to recognize whether the jurors, by whom a certain inquisition was lately summoned before us, and taken before our beloved and trusty T. of B. one of our justices assigned to hold pleas before us, by our writ of nisi prius at K. between him the said E. and the aforesaid T. touching a certain trespasss, &c.

O And if the verdict be taken within any liberty or corporate town, then the writ of attaint is such:

44 Ed. 3. 21.
44 Aff. Br. Attaint 131.
See 14 Ed. 3. 41.
the form.

Ready by oath to recognize whether the jurors, by whom a certain inquisition was lately summoned and taken at L. without our writ, before the mayor and bailiffs of our city of Lincoln, of a plea which was before our beloved and trusty S. Scrope and his companions, our justices assigned to hold pleas before us, between I. of L. and the aforesaid S. of a certain trespasss to him the said I. by the aforesaid S. committed, as it is said, (which plea, according to the liberties granted by the charters of our progenitors, formerly kings of England, and our confirmation thereof to the city and citizens of our city aforesaid, was returned to be pleaded before our same mayor and bailiffs) have made a false oath, as he the said I. grievously complaining to us hath shewed, or not; and in the mean time, &c. (a).

[106]

(*f*) But if the damages do not exceed 40s. he shall not have attaint on the statute, although *A.* sued by bill of trespasss against *B.* who pleads villainage against *A.* and found *A.* to be free. Stat. 28 Ed. 3. cap. 8. *Quære*, if he shall have a writ of *nief* against such verdict.

(a) *Who shall have an attaint.*

The testator entered into religion, and was deraigned; *Quære*, if at-

taint lies against the heir or executor, or if the executor brings attaint, if the testator shall be restored; as if the son is barred in a *Mortdancestor*, the daughter shall have an attaint, and there the judgment was against her brother of the half blood only. *Kelwey* 119. So a special heir shall have attaint. 22 H. 6. 28.

And upon false verdict given in *London* upon *nisi prius*, A
the form of the writ is such (b) :

Ready by oath to recognize whether the jurors, by whom a certain inquisition was lately summoned before us, and taken before R. of M. then one of our justices assigned to hold pleas before us, having associated to him A. of F. at Saint Martin's, London, according to the liberties of the city aforesaid, by our writ, &c.

If a false verdict be given in a corporate town, upon a B
plaint without writ, then it is such :

Ready by oath to recognize whether the jurors, by whom a certain inquisition was lately taken before us at Lincoln, without our writ, between A. of D. of a certain trespass, &c. committed, of which trespass the said B. was convicted, and twenty pounds stand adjudged to the said A. for his damages in this behalf, as it is said, have made a false oath, as the said B. &c.

And if false verdict be given within the verge, then the C
writ shall be such :

Ready by oath to recognize whether the jurors by whom a certain inquisition lately was taken before the steward and marshal of our household at C. without our writ, between K. and the aforesaid T. of a certain trespass to the same K. by the aforesaid T. at C. within our verge (as it was said) was committed, have made a false oath, &c.

(a) And if a man be condemned by false verdict in D
debt or damages, then if he sue an attaint, he shall have a

(b) See 7 H. 6. 32. on a false oath given in *London*, the sheriff returned, that by the custom of *London*, no attaint shall be brought of a verdict given by the commons there, and therefore he could not execute the writ, *Salvis libertatibus civitatis prædictæ*, and out of the chancery issued a writ *de libertatibus allocandis*, upon which issued a *venire facias* to the mayor and sheriffs, to come and maintain their liberties, and an *idem dies* given to the parties, and they came, and their liberties were allow-

ed, and the plaintiff took nothing by his writ, but was awarded to prison. 13 Ed. 4. 3. See the Stat. 11 H. 7. 21. Stat. 37 H. 8. cap. 5. *Dyer* 81.

(a) And so it is in C. B. but some held that a writ should be sent to the warden of the *Fleet* to have the prisoner in court *quolibet die pendente placito*. *Dyer* 193. See and note for the form of this writ, and that C. B. may send to the marshal of B. R. for such a prisoner, and in what form it shall be. *Dyer* 364.

special writ unto the justices, to bail him upon sureties taken, that if the attaint pass against him, he render himself to prison, or satisfy the debt; and the writ is such (b):

The king to his beloved, &c. E. of S. and his companions, greeting: whereas J. hath arraigned before us, by our writ, a certain jury of twenty-four to convict the jurors by whom a certain inquisition was lately taken before us at W. by our writ, between R. and the aforesaid J. of a certain trespass, &c. committed, as it is said; and we have received information on the behalf of him the said J. that he, by pretence of process made in the aforesaid plea of trespass, is taken and detained in the prison of our Marshalsea before us, whereby he is less able to prosecute his jury aforesaid, whereupon he hath besought us to administer to him a fit remedy; we being unwilling that the said J. be so detained in our prison, whereby he is not able to prosecute his jury aforesaid as he ought, do command you, that if the said J. shall find before you sufficient manucaptors, who may mainprize to have him before us to prosecute the attaint aforesaid, and that attaint being determined, if it shall pass against him, or he shall not prosecute that attaint, that he render himself to our prison aforesaid, and as well satisfy us of that which to us, as the aforesaid R. of that which to him belongeth in the premises, and that he further do and receive what the court shall consider in this behalf, then that you cause him the said J. to be delivered out of our prison aforesaid by such mainprize, to prosecute the abovesaid attaint, &c.

Ant. 99.
Post. 108.

E (c) And if a man vouch in a *præcipe quod reddat*, one who entereth into warranty and pleadeth, and loseth by false verdict, he shall have an attaint, and the writ shall make mention of the voucher: and so if a man pray to

8 H. 4. 4.
11 H. 4. 51.
Skeen.
34 H. 6. 31.
11 H. 4. 50.
Gascoigne.
17 Ed. 2.

Recovery in value 32. 9 H. 6. 38. Yet he shall not mention if the tenant for life be dead.

(b) If the plaintiff loses against the garnishee in detinue, and thereon brings maintenance against a stranger, the writ shall make mention of the garnishment. 21 H. 6. Bro. 90. See attaint brought against the vou-

chee by the tenant; exception, for that he did not mention the voucher; *sed non allocatur.* 22 Ed. 3. 11. See 9 H. 6. 39.

(c) See 9 H. 6. 38. 11 H. 4. 5. 4 Aff. 71. 4 Ed. 3.

be received for default of tenant for life, and be received and plead and lose by false verdict, he shall have a writ of attaint, and the writ shall mention the receipt.

(d) And so if it pass against the plaintiff by false verdict, and he bring an attaint, the writ shall make mention of the voucher, and of the receipt; and so if he in the reversion join with the tenant for life by aid prayer, and they lose, by which he in the reversion brings an action, he shall make mention in the writ of the aid prayer; and also in assise, if it be discontinued, and afterwards re-attachment sued, and he lose by false verdict, the writ of attaint shall make mention of the re-attachment, because he reviveth the original of assise.

4 Aff. 7.
4 Ed. 3. 54.
Br. Attaint 49.

But if the defendant in a writ of detinue pray garnishment, and the garnishee come and plead, and the plaintiff lose, by which he bringeth attaint against the garnishee, the writ of attaint shall make mention of the garnishment. That is well debated, *M. 9 H. 6.* in the title *Attaint* in the abridgment.

9 H. 6. 38, 39.

But, saving the opinion of the book, it seemeth the writ of attaint shall make mention of the garnishment, &c. for the defendant in a writ of detinue who sueth the garnishment, is in manner out of court; and when the garnishee comes, the plaintiff counteth upon his original writ, which is the writ of detinue, and the garnishee shall answer to that count; and the writ of garnishment is but to make him come in and answer to the plaintiff to his original and count, and when he comes and pleads, he pleads unto the plaintiff's count, which is upon the original, by which the plea which is between the plaintiff and the garnishee is upon the original plea, as it seemeth; *tamen quere.*

11 Aff. 19.
Br. Attaint 57.
23 Aff. 11.

(a) And if a man plead a deed in bar, in which there are witnesses, and the deed be denied, for which process

(d) If a parson prays in aid of the patron and ordinary, and loses by action tried, the parson only shall have attaint, and not the patron. 19 H. 6. 75. 22 H. 6. 23. See 9 H. 6. 39. 38.

(a) See 22 Aff. 15. 11 Ed. 3. 11 Aff. 19. 40 Aff. 23. 25. 23 Aff. 11. 3 Ed. 3. Attaint 50.

is awarded against the witnesses who join with the jury, and find that it is the plaintiff's deed; now he shall not have an attaint, &c. because the witnesses affirm the verdict by their testimonies. But if it be found not his deed, then the other party shall have an attaint, for the witnesses cannot prove a negative, but of the affirmative they may have notice whether it be his deed or not. A man shall have an attaint in special cases, where every word of the verdict is true; as if a man hath had common appendant unto his land, time out of mind, and he bring an assise of the common, and make title that he hath had common time out of mind, &c. without speaking of the appendancy, and it is found for him; the defendant shall have an attaint, for the plaintiff's title is for common in gross, and not common appendant; and yet the words of the verdict are true, that he hath had common time out of mind, &c. but not in such manner as shall be taken by the title.

Challenge
132. Thorp.
11 Ed. 3.
Attaint 16. ac.

10 Ed. 4. 17.
ac. Co. 291,
292.

A And so if a man have a rent as forester in fee of such a forest time out of mind, and in assise of that rent he make title thereunto, that he hath had a rent out of that land time out of mind, &c. without saying as forester in fee, &c. and it be found for him, the other party shall have an attaint upon that verdict, although the words of the verdict be true, for he hath not had such rent by prescription as should be intended and taken by his title.

10 Ed. 4. 17.
24 H. 8.
Br. Attaint 96.

B (a) If a man recover outrageous damages by verdict, but release parcel of the damages before judgment, and have judgment for the residue, the defendant shall not have an attaint for those damages which are released (b).

35 H. 6. 30.
11 Ed. 4. 5.
13 Ed. 4. 2.
14 H. 7. 5.
9 H. 6. 2.
3 H. 6. 29.
3 Martin ac.
48 Ed. 3. 19.
cont. 33 H. 6.

25. 2 H. 4. 2. per curiam, so of error. 18 H. 8. 1. 21 H. 6. 56. 28 H. 8. 5, 10. 38 Ed. 3. 12. and 27. Br. Collusion 18. upon writ of inquiry of waste for an abbot, quare jus shall issue, which proves it is no verdict, but an inquiry.

(a) And therefore, though he cannot abridge the damages given on such a verdict. 9 H. 6. 2. yet he may have an attaint for too small damages. *Ibid.*

(b) And see accordant to this case, a release of damages shall oust the attaint, 14 H. 7. 5. 12 Ed. 4. 5. 13 Ed. 4. 2. 5.

(c) And

be received for default of tenant for life, and be received and plead and lose by false verdict, he shall have a writ of attaint, and the writ shall mention the receipt.

(d) And so if it pass against the plaintiff by false verdict, and he bring an attaint, the writ shall make mention of the voucher, and of the receipt; and so if he in the reversion join with the tenant for life by aid prayer, and they lose, by which he in the reversion brings an action, he shall make mention in the writ of the aid prayer; and also in assise, if it be discontinued, and afterwards re-attachment sued, and he lose by false verdict, the writ of attaint shall make mention of the re-attachment, because he reviveth the original of assise.

4 Aff. 7.
4 Ed. 3. 54.
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9 H. 6. 38, 39.

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11 Ed. 4. 5.
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(c) And

(c) And in a writ of waste the plaintiff shall have a writ to inquire of the waste, who if they give false verdict by which the plaintiff recovereth, the defendant shall have an attaint, *per Cur' M. 2 H. 4.* But I do not see how the same can be warranted by any statute, which giveth the attaint, because the writ of inquiry is awarded by the court *ex officio per sacramentum proborum, &c.* And the sheriff may make the inquiry by the oaths of six or eight persons of the waste, and he is not bound to take twelve persons. *Quære* of this. C

42 Ed. 3. 26.

(d) The king shall have an attaint upon a false verdict passed against him as well as a common person. D

34 H. 6. 32.
ac. 12 H. 4. 5.
In waste against two, one made default, and the other pleaded; he who made default shall not have attaint.

43 Ed. 3. 36.

34 H. 6. 12.

Morle cont.

39 H. 6. 1. ac.

3 H. 4. 23. Tirwin.

(e) In trespass against two, one cometh and pleadeth not guilty, and is found guilty, and afterwards the other cometh and pleadeth not guilty, and is found guilty by another inquest; now in this case the first jury shall assess all the damages for the trespass, and the defendant in the last inquest shall have an attaint of the damages assessed by the first inquest, if they be outrageous or excessive, &c. E

21 Aff. 16. Br.
Attaint 64.
36 H. 6. 13. ac.
in personal actions.

(f) Tenant by statute-merchant shall have an attaint, if he be barred in assise by false verdict, or found against him by false verdict, where he is defendant in the assise. F

(c) So agreed by *Martyn contr. Balbington*, for by him it is more than an inquest of office, for that the judges are bound to render judgment according to the finding of the inquest, as in this case of waste; but on an inquest to inquire of damages, there it is only for information, and the court may increase or diminish the damages. 3 H. 6. 29. See 2 H. 4. 31. 48 Ed. 3. 19. *contr.* 7 H. 4. 38.

(d) See 42 Ed. 3. 26. 4 Mar. Bro. Information 127. 11 Co. 5. 6.

(e) It seems, that in this case, as to the damages, they shall join in an attaint, adjudged 25 H. 6. 23. but

as touching parcel, if they be found by one verdict guilty, they may join, as 18 Ed. 3. 25. 30 Ed. 3. 1. or they may sever. 35 H. 6. 21. *per Assbt.* 46 Ed. 3. 81. *per Finchd.* See 1 H. 5. 13. 44 Ed. 3. 7. 44 H. 6. 32.

(f) *A.* sued an execution against *B.* on a statute-merchant, *B.* brings an *audita querela*, which on an issue is found for *B.* *A.* brought an attaint, and adjudged that it lies, and if the false oath be found, execution shall be awarded for him. 21 Ed. 3. 59. See 21 Aff. 16. 21 Ed. 3. 47. and 43 Aff. 41. how if he shall be acquitted on the issue.

(g) If

- G (g) If a man recover in a *præcipe quod reddat*, against a tenant by false verdict, there have been divers opinions whether the tenant shall have an attaint before execution sued out against him. *Vide* 41 *Ed.* 3. *Lib. Aff.* 21 *H.* 6. 60. But the statute of 1 *Ed.* 3. saith, That a man shall have an attaint of damages before execution sued of them, before which statute it seemeth he could not have attaint of them. But in the time of *Ed.* 1. the defendant sued forth an attaint for damages upon false verdict given against him in a writ of trespass before the plaintiff sued execution of the damages, which see in title *Attaint* in the abridgments, *Temp. Ed.* 1. And also by the same reason, if a man recover land, the tenant shall not have attaint before execution. (a) And *non tenure* hath been pleaded, and admitted a good plea divers times in an attaint. And on the other side, if the tenant should not have an attaint before execution sued, or entry made by the demandant or his heir, then perhaps they would not enter until the jurors are dead, and then the tenant would be without remedy by attaint. 21 *H.* 6. 54. 34 *H.* 6. 13. 26 *H.* 8. 2. 31 *H.* 6. 12. 31 *H.* 6. 39. 22 *Ed.* 3. 10. *Br. Attaint* 42.
- H (b) If a man who was tenant recover in attaint, the judgment shall be, that he shall be arrested, &c. which could not be, if the demandant hath not entered, and when he himself is tenant in possession. 5 *Aff.* 24. *Ed.* 3. 34. *Br. Attaint* 48. 6 *Aff.* ib. *Br.* 52.
- I And I think it the better opinion, that if in trespass the defendant plead villainage in the plaintiff, &c. and he be found frank, unto the damage of two shillings, the defendant shall not have an attaint for the smallness of the damages, &c. But in a (c) *præcipe quod reddat*, if the

(g) See 41 *Ed.* 3. *Attaint* 27. 21 *H.* 6. 55. 113. 34 *H.* 6. 11. 12 *H.* 6. 6. *Ant.* 105. *Attaint* 70. (a) See 31 *H.* 6. 12. 14 *Aff.* 2. 26 *H.* 8. 2. 8 *Ed.* 4. 19. 6 *Ed.* 3. *Waste* 25. *contr.* *Vide ant.* 97. (b) And also to the same issues. 30 *Ed.* 3. *Judgment* 140. 40 *Aff.* 20. (c) He who pleads non-tenure, shall have an attaint. 40 *Aff.* 20. 23. *per Fitzb.* and therefore, where the party himself pleaded non-tenure of parcel, the plaintiff was driven to maintain his writ. 21 *Ed.* 10. See in an attaint brought against him who recovered non-tenure, held no plea, 8 *Ed.* 4. 19. *viz.* if he has once execution, *per Prisot.* 35 *H.* 6. 44. See 10 *Aff.* 8. 31 *H.* 6. 12. 26 *H.* 8. 2.

tenant

tenant plead *non-tenure*, and it be found against him, he shall have an attaint, &c.

(d) An attaint shall be maintainable against the terre-tenant without naming him who was party to the record: otherwise it is in a writ of *recordari*; for that shall be sued against him who was party, or his heir or executor, if it be a personal action, otherwise it shall abate.

Attaint doth not lie upon false verdict given in an appeal of maihem, or appeal of felony or murder.

An attaint may be sued in the common pleas, if the record be there; or it may be sued in the king's bench upon a false verdict given in the common pleas, if the record be removed into the king's bench.

A recovery was in an assise brought in the king's bench, and afterwards that record was sent unto the common pleas, and the party sued an attaint upon the record in the common pleas. *Vide 8 Ed. 2. H. Assise, Iter. Kan.*

Attaint was sued upon a false verdict given against the defendant when he claimed liberty, and adjudged that he should have it. *H. 15 H. 3.*

(a) And the writ of attaint may be sued out of the

14 Aff. 2.
Br. Attaint 59.
10 Ed. 4. 13.
8 H. 4. 18.
9 H. 6. 47.
34 H. 6. 36.
35 H. 6. 30.
contr. is admitted.
34 H. 6. 36.
35 H. 6. 30.
the cont. is admitted. 8 Eliz.
Dyer 250.
16 Aff. 4.
Br. Attaint 60.
44 Ed. 3. 2.
44 Aff. 20.
21 Ed. 3. 10.
Br. Att. 32.
21 Ed. 3. 3.
Ibid. 51.
H. 15 H. 3.
21 Eliz.
Dyer 364.

(d) Yet see in an attaint by him who was plaintiff against him, who was tenant in the original, non-tenure held a good plea, except the plaintiff had freshly sued, 6 Ed. 3. 32. 21 H. 6. 55. *per Ascue*, &c. but it is there agreed, that *non tenure* is a good plea against him who recovers. But it is certain, that attaint may be brought against the tertenant alone, and if it pass against him, yet he shall not be taken; *contra* of him who was party. 8 H. 4. 21, 22. See jointenancy in attaint against him who recovered part; *contra* in attaint against the tenant, where the party was barred. 26 Aff. 12. But if after the writ of attaint purchased, the record be removed by writ of error, they shall yet proceed in C. B. Dyer 281, 284. See 6 Aff. 10. 40 Aff. 20. 4 Ed. 2. Attaint 67. *contra*.

☞ The record of an assise of fresh force was sent by writ out of chancery to C. B. and attaint was brought on the record there. 21 Ed. 3. 10. See Dyer 81. and there it seems, that if issue be joined in C. B. on a matter triable in the county *Palatine*, and it is there tried, and the record removed, that attaint lies here. 19 H. 6. 53. See Dyer 250. that attaint lies in C. B. on a record in B. R. sent by *mittimus* into C. B. and so on a verdict *in scaccario*.

(a) See 21 Ed. 3. 3. If an assise be taken before justices assigned, and adjourned for difficulty into bank, if an attaint be sued, it is necessary to sue a writ to the justices, to remand the record before the justices assigned in *pais*, and when they have the record, there may issue an attaint on the rolls there.

common

common pleas or king's bench, upon a false verdict given in the same court, as well as out of the chancery. *Quod vide* 30 Ed. 1. *Itin. Cornub.*

P In a writ of entry brought in *Suffex*, the defendant pleaded a release in *London*, which was found against him in *London*, for which he brought an attaint in *London*, and it was maintainable; *quod vide* M. 18 Ed. 1. *F. Brev.* 827.

Q (b) If the king recover by false verdict, he shall have attaint against the petit jury only, as if the king recover by erroneous process, &c. the party shall have a writ of error of the judgment, and shall not name the king, because he is always present in the court. 20 H. 7. 6.
[108]
Ant. 106. E.

A The vouchee or tenant by resceit, or he in the reversion, where he joineth with the tenant by *aid prier*, shall have attaint if he lose by false verdict (c): and if tenant for life lose by false judgment, he in the reversion shall have an attaint or writ of error, living the tenant for life, by the statute of 9 R. 2. *cap.* 3. 2 H. 4. 4.
16 Ed. 3.
Error 72.
20 Ed. 3.
Error 2.
21 H. 6. 29.

B (d) If the defendant in trespass plead villainage in the plaintiff, and he say that he is frank, and be so found by verdict, and afterwards the defendant die, his heir shall have an attaint to avoid this estoppel and false verdict, although it was given in a personal action.

C In an attaint upon a recovery in *præcipe quod reddat*, the defendant pleads *non-tenure*, and the demandant saith, that he made a feoffment unto unknown persons, &c. and that he brought the action within the year, and with that, that he will aver that the defendants took the profits the day of the writ purchased; and the defendant saith, 8 H. 4. 13.
Skyene.

(b) Note; In suits *pro domino rege* & *seipso*, attaint and error granted in *parl. Rot. Parl.* 21 Ed. 3. No. 24. *Quære.*

(c) But the writ ought to mention the voucher and also expressly, that he entered into warranty, and not only by a supposal. 22 Ed. 3. 4. See attaint by him in the reversion, and by resceit without mention made of the death or life of the lessee, and yet

the judgment is divers (different) 4 Ed. 3. 54. See *Dyer* 241. b. 44 Ed. 3. Attaint 22. Ant. 99. E.

(d) See accordant 13 Ed. 4. 2. See 8 H. 4. 16. the heir shall have an attaint on such a trial in a *homine replegiando*, but not in trespass. 19 H. 6. 18. See 33 H. 6. 19. 45 Ed. 3. 1. 14 H. 7. 5. 13 Ed. 4. 2. 33 H. 6. 19.

that

21 H. 6. 55.
21 Ed. 3. 10.
Br. Attaint 32.
It shall be tried
by twelve, and
not by the at-
taint.
19 Aff. 13.
Br. Attaint 63.
32 Aff. 13.
Br. Attaint 75.

that he did not take the profits, &c. (a) Now this issue shall be tried by the attaint; and if they give false oaths, he shall have an attaint upon that verdict; by *Newton*: as if in a writ of right the tenant plead a collateral warranty made within the same county, it shall be tried by the grand assise; and if they give false verdict, he shall have an attaint, because the same is out of the point of assise; by *Newton*, Tr. 21 H. 6.

(b) Nonsuit in attaint after appearance is peremptory, D and he shall not have a new attaint; and so upon a *retraxit*, if the demandant say, he will no more sue his attaint, and that be entered upon record, he shall not after have another attaint.

14 Aff. 2.
Br. Attaint 59.

(c) If a man have a *præcipe quod reddat* against divers, E by several *præcipes*, and by inquest it be found against the

(a) For the issue arises on the point of attaint, and therefore shall be tried but by twelve. 21 Ed. 3. 10. but if in attaint in assise, the grand inquest inquire of damages, no attaint lies thereof. 8 H. 4. 22. See 12 H. 6. 6. 66. an issue collateral, real, as jointenancy, &c. shall be tried by the twenty-four; and by *Babb.* Attaint there lies, if they take a false oath, by assise. See 27 Aff. 61. if in attaint the tenant pleads *non tenure*, &c. he shall plead over that he made a true oath, &c. See 22 H. 6. 55. F. Attaint 65.

(b) And the plaintiff shall be amerced, and taken. 6 Aff. 5. See Co. Lit. 139. a. 19 Aff. 13. 34 Aff. 6. and 9 *infra* E.

(c) See the like case 35 H. 6. 22, &c. *per Prisot*, and 18 Ed. 3. 25. If in an assise against two, on *nul tort* pleaded, the one is acquitted of the disseisin, but he is tenant, and the other is found disseisor, they shall have several attainments; and so if one is found disseisor of part, and the other of the residue, *per Cur.* 30 Ed. 3. 1. In rescue against two, they plead not guilty, and found against them, they

shall join in attaint; but in an assise against several tenants on a false oath as to parcel, they shall sever in attaint; *contr.* if it be only for damages, *per Tushet. quære*; and see they may join in error. 3 H. 4. 16. he who is acquitted of a disseisin may join in error with him who is found disseisor, but not in attaint. 2 Ed. 3. 3.

A writ of forcible entry and detainer against A. B. and C. and all found guilty of the forcible entry, but C. only of the forcible detainer; they shall join, &c. *Dyer* 141. See 29 Aff. 9. a joinder in attaint by him who disclaims, him who took on him the tenancy of parcel, and him who took the residue jointly with a stranger, and the writ found true. See 19 R. 2. Brief 926. Tenant by statute or lessee for years, or a guardian in an assise against him, and he who has the freehold, and one is acquitted of the disseisin, but the other found guilty, they shall join in attaint as it seems, for he hath lost his term, and he has no other remedy, because he was party to the judgment. 43 Aff. 41. See 14 Aff. 20. 35 H. 6. 22.

demandant;

demandant; he shall have a writ of attaint against the tenant, &c. But if it be found against the tenants, they shall have several attainments; for as unto all of them, it is a several inquest to try their issues severally.

F If the demandant be barred in a *formedon*, and afterwards release all actions, or all his right in the land, yet his heir shall have a writ of attaint.

G And so if the father be nonsuit upon an attaint upon a writ of *formedon*, he there shall have an attaint.

H And a man shall have an attaint before justices of *oyer* Attaint 68. without original writ, upon a bill only sued before the same justices. *T. 5 Ed. 2.*

I If false verdict be given in assise of *novel diff.* then if the plaintiff will sue an attaint, he ought to have such a writ.

The king to the sheriff of Lincolnshire, greeting: If A. shall make you secure, then summon, &c. twenty-four knights of the venue of S. that they before our justices at the first assise when they shall come into those parts; or thus, before our beloved and faithful R. of W. and B. of F. and those whom we have associated to them (touching certain matters, &c. which the same R. and B. may make known to you) (a) ready by oath to recognize whether J. unjustly and without judgment disseised the aforesaid A. of his freehold in S. or of his common of pas-

(a) Yet see it adjudged, that on such writ the party may assign a false oath on any special plea in the same assise. 11 H. 4. 5. 265. Note; If on a special issue they find for the plaintiff, and inquire over of the seisin and disseisin, and that is also found, he may assign a false oath in the disseisin found, but in no other point; *per Thirn. Hill. and Hankf.* For he ought to have a special writ for that, or else a general writ *quod jurat' in assisa capt' falsum fecer' sacramentum*; or they may assign the false oath, in what point they will. 11 H. 4. 27. And note there in assise against two, the one pleads to the writ, and the

other to the assise; if he who pleads to the assise brings attaint, he cannot assign a false oath in any point put in issue by his companion. But they may have an attaint in common, and then each may assign in that which belongs to him; adjudged. And yet by a plea to the writ by one, if found for by him, the writ abates as to both. 29 Aff. 9. adjudged accordant; so 11 H. 4. 65. and yet see by *Hull*, the tenant may assign a false oath in an assise between the plaintiff and a disseisor; but adjudged, that he cannot assign it on a plea to a writ of assise brought by another name. 11 H. 4. 52. 65.

ture in S. which belongs to his freehold in the same town, after the first passage over of lord H. son of king J. into Gascony, whereof the said A. complains that the jurors of the assise of novel disseisin which between them was summoned and taken before us at W. by our writ, or before the aforesaid R. and B. or before our beloved and faithful W. of H. and his companions, our justices last in eyre at L. in your county by our writ, have made a false oath; and in the mean time that you diligently inquire who were the jurors of that assise, and have them then before the justices aforesaid at the assise aforesaid, or before R. and B. and summon, &c. the aforesaid I. Or thus, The aforesaid I. H. who now holds the tenements aforesaid, that he be then there to hear that recognition: and (b) have there the names of the knights and this writ.

And if a man lose by false verdict in assise before justices K of assise, if he will sue an attaint before the same justices, he ought to sue a patent directed unto the same justices to give them authority to hold plea thereof; or he may sue a patent unto other justices to hold plea of that writ of attaint; and the form of the patent is such:

The king to his beloved and faithful R. and B. greeting: L. know ye, that we have constituted you, &c. our justices, together with those whom we have associated unto you, to take a jury of twenty-four knights, which A. hath arraigned, before you by our writ against I. to convict the jurors in an assise of novel disseisin, which was summoned between them and taken before you at W. by our writ, of tenements in S. or of common of pasture in S. Or thus; before you the aforesaid R. and

(b) And note; In this writ the jurors shall not have the view, for the writ does not require it; see 3 H. 4. 15. in an attaint by the plaintiff in assise; yet *contra* 8 Ed. 2. Aff. 396. In attaint by the defendant in assise. Note; In this attaint, if it be brought by him who was barred in the assise, he shall recover the land, and his damages and costs lost in the first assise, and the issues until the judgment rendered: but if the tenant in the

assise had pleaded in bar, *que ne conuſt ouſter*, the attaint shall only inquire of that matter, in which the false oath is assigned, and not of the seisin and disseisin; adjudged 8 H. 4. 22. Note; If the false oath be found, the justices may inquire of the damages by another inquest. *Ibid.* See the judgment in *Dyer* 235. *Quod recuperaret ſeiſinam. Sed non per viſum jurator*.

our beloved and faithful S. lately our justices, &c. at W. by our writ, of tenements in S. and therefore we command you, that at a certain day, &c. you shall appoint, you take that jury to do thereupon that which to justice belongs, according to the law and custom of our realm saving to us the amercements thence coming: We also command our sheriff of Lincolnshire, that he cause that jury to come before you at a certain day and place, whereof you shall give him notice. In witness whereof we have caused these our letters to be made patent. Witness, &c.

And a man shall have a writ of attaint upon a false verdict in an assise of nuisance; Wherefore he levied or prostrated a certain pool in N. &c. or a certain ditch, or a certain hedge; or diverted a watercourse, to the nuisance of, &c. in the same town, &c. and the form of the writ is such:

If A. &c. then summon, &c. ready by oath to recognize whether J. unjustly and without judgment levied or prostrated a certain pool in N. or a certain ditch, or a certain hedge, or diverted the watercourse in N. or made narrow, or obstructed a certain way in N. to the nuisance of, &c. in the same town, after the first, &c. whereof he the said A. complains that the jurors of the assise which was summoned between them and taken before, &c. at N. by our writ, have made a false oath; and in the mean time, &c. and summon, &c. And have there, &c.

[109]

A And it is a rule in the Register, That in an attaint upon an assise of novel disseisin a certain day shall be set, as in assise, On Monday or other day, on the morrow, or on the octave, or in fifteen days of Easter; but it behoveth that the tenant have garnishment by fifteen days in the attaint, for the statute doth not give less time, but only in assise before the king.

B And there is another form of the writ, if the assise be adjourned into the common pleas, and taken there before the justices of the common pleas, and the same appeareth in the Register.

C (a) And another form is of the writ of attaint, where the

(a) See 11 H. 4. 51. and 65. per general attaint on an assise, where Brian; husband and wife brought a they had pleaded a record, but failed
Vol. I. B b at

the assise is brought against the husband and wife, and the wife is received for the default of the husband, and pleadeth and loseth by false verdict.

And another form of attaint is, where the tenant in the assise pleadeth the release of the plaintiff, or of his ancestor in bar of the assise which is found against them, upon a false verdict. D

And another form of the writ of attaint is, where the verdict passeth by *nisi prius* out of the common pleas. E

And another form of the writ of attaint is, where the assise is summoned before certain justices, and after it is taken before other justices by a general commission, and a false verdict is given upon the same. F

And another form of the writ is, if an assise be summoned before divers justices, and afterwards is taken by any of them by virtue of the writ of *si non omnes*, then the party shall have a writ of attaint, rehearsing this matter. G

And if a man, upon verdict given in an assise before the justices of assise sue an attaint before the same justices, or (a) other justices, he may have a writ of association directed unto the same justices before whom the attaint is laid; and the writ of *si non omnes*, as he shall have in assise, &c. who was plaintiff there: and he shall have a writ patent directed unto him who is associate, &c. which H

at the day. The wife is received and adjudged (well). For in an assise, the husband, notwithstanding his failure of record and default, &c. the wife is party to the assise; for after such rescit, the seisin and disseisin, it shall be inquired, and of damages; but if it be in a *præcipe*, it ought to be a special attaint, because there, by the husband's default she is out of court; but here, if the one or the other be in court, it is sufficient. *Note*; In attaint against a vouchee, tenant by rescit, either by him who joins in aid, or by him who is received to sue sole; it was agreed that the writ should not be general *in loquela*

quæ fuit int' A. & B. *per breve nostrum*: But it is necessary to have a special writ, making mention of the original, and of the tenant, &c. *per Cur'*; and so by *Passon*, in an attaint against the garnishee; but by *Babb.* and *Strange*, a general writ shall be good, without mention of the default; if the case be so, that the garnishee makes title to the land, &c. for the whole judgment shall be against the garnishee, and he is not to have any avail, but prejudice by the attaint. 9 H. 6. 38.

(a) See *per Hankf.* That attaint belongs to B. R.

writs

writs appear in the Register after the writs of assise of novel disseisin.

But it appeareth by a writ in the Register, that there was a constitution made, which required, that the assise and jurors and certificate should be taken before the justices commonly assigned: by which it seemeth, that a man shall not have an attaint upon a false verdict given in assise, but before the justices of assise, or before the justices of the common pleas, if the record be removed thither, or before the justices of the king's bench, if the record be removed before the king; and the form of the writ is such:

21 Ed. 3. 3.
Br. Attaint 31.
21 Aff. 7. Br.
Certificat. de
Assise 8.
21 Ed. 3. 10.
Br. Att. 32.
8 H. 6. 4.
No attaint upon
tenorem recordi,
but upon the
record itself.

The king to his beloved and faithful F. and G. greeting: Although we lately appointed you our justices to take a jury of twenty-four knights, which J. who was the wife of E. arraigned before you by our writ against E. who was the wife of A. of L. to convict the jurors in an assise of novel disseisin, which between him the said A. and the aforesaid I. and others, &c. was summoned and taken at L. before our beloved and faithful R. and B. our justices at the assises, &c. assigned by our writ, of tenements in S. because the appointment aforesaid was made contrary to the form of our statute lately set forth at Northampton, in which is contained, that assises, attainments and certifications be taken before the justices commonly assigned, and not others: which statute in all and singular its articles we willing inviolably to be observed, command you, that you in no wise intermeddle touching the taking of the jury aforesaid under pretence of our commission so made. Witness, &c. Which statute was made in the second year of Ed. 3. King of England, chap. 2.

By which it appeareth, that he shall not have a writ of attaint by commission, &c. before other justices, but only before justices of assise, or of the common pleas, or king's bench, as before is said.

I (a) The form of a writ of attaint upon a redisseisin is such:

The

(a) See 40 Aff. 23. 2 H. 4. 2. if the false oath be found, it shall not Ataint on a redisseisin; and it seems impeach the record, nor shall he be restored
B b 2

The king to the sheriff, &c. If R. shall make you secure, &c. then summon, &c. twenty-four lawful knights, &c. ready, &c. Whether the jurors, by whom a certain inquisition was taken before E. then sheriff of your county, and keeper of the pleas of our crown thereof, by our writ, at W. between R. and the aforesaid B. of a certain redisseisin done by the aforesaid B. to the same R. as it is said, of one messuage and nine acres of land with the appurtenances in W. have made a false oath, as the same R. grievously complaining to us hath shewed; and in the mean time do you diligently inquire who were the jurors of that inquisition, &c. and have them then before the aforesaid R. and I. and summon the aforesaid B. that he be then there to hear that recognition, and have there the summoners, &c.

Vi. 8 Eliz.
Dyer 25.

And it seemeth, That this writ of attaint ought to be sued before the justices of assise of the said county, and that they shall have a patent for the same directed unto them, and that the record shall be brought before them. But if the record be removed into the common pleas, then it seemeth he shall have his attaint there.

And it appeareth by *Glanvile*, That a man shall have K an attaint, and the manner how the jurors shall be punished.

42 Ed. 3. 25.
8 H. 4. 23.
Gascoigne.

And if any jurors be convict of false oath, they shall be L imprisoned, and then they ought to sue unto the king to pay a fine in lieu of imprisonment, and when they are agreed with the king, they may sue a writ to remove the record before the king in the king's bench, and the writ shall be such :

By this it appeareth that they shall not forfeit their

lands in fee, as upon præmunire, but for their own lives, by Br. Att. 100 & 95. upon the book of 22 Ed. 4. 1.

The king to his beloved E. and his companions, &c. greeting: Whereas W. of M. and others, of a false oath by them made in a certain inquisition taken at W. before W. of B. and his companions lately justices of the lord the king, &c. of the bench, by our writ between R. demandant, and W. of M.

restored to the possession, but only be title by subsequent feoffment from discharged of the damages and the him who recovered, he shall be re-fine; yet perhaps if the party has stored to the possession.

tenant

tenant of the manor of B. with the appurtenances (except one garden in the same manor) before our beloved and faithful W. of B. and his companions, &c. of the bench, by a certain jury of twenty-four have been convicted, and for that reason adjudged to our prison of the Fleet, and their goods and chattels, lands and tenements, seized into our hand; we, for certain reasons, have caused the record and process of the business aforesaid, with all things touching the same, together with the bodies of the aforesaid W. and others, to come before us, and now on the behalf of him the said W. we are besought, that whereas he hath already been a long time and still is detained in such prison, by reason of the premisses, that we would receive of him a reasonable fine for the imprisonment, for his goods and chattels, and lands and tenements aforesaid, and also for the estrepement of the lands and tenements aforesaid, and cause him to be delivered from the prison wherein he is so detained; we having compassion of his state in this behalf, and being willing to do a special favour to the same W. do command you, that having seen the record and process aforesaid, and having had consideration of the value of the goods and chattels, lands and tenements aforesaid, and the estrepement thereof, you receive a reasonable fine of the same W. for that which belongs to us in this behalf, and deliver him the said W. from the prison wherein he is detained by occasion of the premisses, and so cause to be delivered to him his goods and chattels, lands and tenements being in our hand, for the fine abovesaid. Witness, &c.

And thereupon the party shall be fined, as the justices of the king's bench will assess in their discretion; and upon that they shall grant a writ to deliver his goods and his lands, and to deliver him out of prison; and the writ shall be such:

The king to the sheriff, &c. Whereas W. of M. one of the jurors in a certain inquisition taken at W. before W. of B. and his companions, justices of the lord the king, &c. (as above until) our justices of the bench by our writ of a false oath by him the said W. made by a jury of twenty four knights was convicted, and for that reason adjudged to our prison, his goods and chattels, and also his lands and tenements were seized into our hand, as appears to us by the inspection of the record and pro-

43 Ed. 3. 26.
See the Stat.
3 H. 8. c. 15.

cess aforesaid, which we have caused to come before us, and he the same W. afterward came in our court before us, and made a fine to us for the imprisonment aforesaid, and to have his lands and tenements; we command you, that without delay you cause the said W. to have again all the lands and tenements of him the said W. if they are in our hand for that and no other reason, and that you absolutely supersede the taking the body of him the said W. for the reason aforesaid. Provided nevertheless, that you answer to us for the value of the lands and tenements aforesaid from the time of the judgment upon the verdict of the jury aforesaid given, until the date of this writ, and also for the estrepement of the same, when it shall be inquired thereof. Witness W. Thorpe, &c. in the sixth year. Roll. 104.

And there are divers other manner of forms of writs of attaint, which are not here mentioned, because a man may see them in the Register. A

Writ of Oyer and Terminer.

2 Hawk. P. C.
20.
Finch 318.

B
THE writ of *oyer and terminer* should not be properly called a writ; but it is a commission directed unto certain persons, when a great assembly, insurrection, or a (a) heinous misdemeanor or trespass is committed and done in any place*. In such case it is the manner and usage to make a commission of *oyer and terminer*, to hear and determine such misbehaviour; and the statute made 2 Ed. 3. cap. 2. requireth, that no commission of *oyer and terminer* be granted but before the justices of one bench or other, or the justices itinerants, and that for horrible trespasses; and it is of the king's special grace, according unto the form of the statute thereof made in the time of the grandfather of the said king Edward; and the form of the commission is such:

(a) And therefore a *supersedeas* may be hereto, *quia non enormis transgressio*.
12 Aff. 21.

* This writ is not confined merely to criminal matters. *Infra* 114. C.

C The king to his beloved and faithful A. B. and C. greeting :
We have received information from the grievous complaint of D. that E. F. and G. and certain other malefactors and disturbers (a) of our peace, with force and arms made an assault upon him the said D. at N. and him beat, &c. so that his life was despaired of, and other wrongs to him did, to the great damage of him the said D. and against our peace. And because we will not leave the trespass unpunished, if it was committed in such manner, we assign you and two of you our justices to inquire by the oath of honest and lawful men of the county of Lincoln, by whom the truth of the matter may be better known, of the names of the malefactors aforesaid, who, together with the said E. F. and G. committed that trespass, and the truth of the trespass aforesaid more fully, and to hear and determine the same trespass according to the law and custom of our realm; and therefore we command you that at certain days and places which you or two of you shall appoint for this purpose, you make that inquisition, and hear and determine that trespass in manner aforesaid done, as to justice belongs, according to the law and custom of our realm, saving to us the amercements and other things thereof belonging to us: for we have commanded our sheriff of the county aforesaid that, at the days and places which you or two of you shall make known to him, he cause to come (b) before you or two of you, so many and such honest and lawful men of his bailiwick, by whom the truth of the matter in the premisses may be better known and inquired. In witness whereof, &c.

And the rule in the Register is, That if this clause, [111]
And certain other malefactors, &c. be not put into the commission aforesaid, then in the end shall be this clause, By whom the truth of the matter may be better known, &c. and

(a) See an oyer and terminer for a ward ravished, and goods taken, and the defendant found guilty, and thereupon a *scire facias* issued. 29 Ed. 3. 37. See the like writ, but *quere* of *quidam alii malefactores*, &c. because not indicted. 26 Aff. 7.

(b) And note; If they award a *venire facias*, without shewing (before) that it is returned, it is well, 29 Ed. 3. 30. but a *venire facias* ought to be awarded, 26 Aff. 7.

Writ of Oyer and Terminer.

the truth of the trespasss aforesaid more fully, and to hear and determine the same trespasss, &c.

And the form of the writ which shall be directed unto A the sheriff upon that commission, is such :

The king to the sheriff, &c. From the grievous complaint of D. &c. (as above until) we have assigned our beloved, &c. A. B. and C. and two of them our justices to inquire by the oath of honest and lawful men, &c. (until) to hear and determine according to the law and custom of our realm: and therefore we command you, that at certain days and places which they the said A. B. and C. shall make known to you, you cause to come before them or two of them, so many and such honest and lawful men of your baiiwick by whom the truth of the matter in the premisses may be better known and inquired and have there this writ, &c.

And the king may make a writ of association unto the B justices of oyer and terminer, to admit into their company those whom the king hath associated unto them; and the form is such :

Infra D.

The king to his beloved A. B. and C. Know ye, that whereas lately upon the complaint of D. suggesting to us that E. F. and G. and certain other malefactors and disturbers of our peace, &c. until, &c. unpunished: we assign you and two of you our justices, &c. to hear and determine the same trespasss according to the law and custom, &c. We have assigned our trusty and well beloved H. to act in the premisses with you or two of you; yet so that if at certain days and places, which you or two of you shall appoint for this purpose, he the said H. shall happen to be present, then that you admit him for a companion for this purpose in form aforesaid: for we have commanded him the said H. that he attend to this matter, together with you or two of you, as is aforesaid. Witness, &c.

And the form of the writ of association, which shall be directed unto him who shall be associated unto the commissioners, is as follows.

Infra D.

The king to his beloved and faithful H. greeting: Know you, that whereas lately upon the complaint of D. suggesting to us that E. F. and G. and certain other malefactors, &c. we have assigned our beloved, &c. A. B. and C. and two of them
our

our justices to inquire, &c. (as in the patent until) and determine according to the law, &c. we have associated you to the aforesaid A. B. and C. and two of them, to act in the premisses with them or two of them; yet so that if at certain days and places, which the same A. B. and C. or two of them shall appoint for this purpose, you shall happen to be present, then that they admit you a companion for this purpose, otherwise A. B. and C. or two of them (your presence not being expected) may proceed to act in the premisses: and therefore we command you, that you attend to act in form aforesaid in the premisses, together with the aforesaid A. B. and C. or two of them, &c. saving to us, &c. For we have commanded the said A. B. and C. that they admit you a companion for this purpose, as before is said.

C And then the king may send another writ unto the said justices of oyer and terminer to proceed, although all the justices do not come at the day of the sessions. And this writ is called a writ of *si non omnes*, &c. and shall be directed as well unto that justice who shall be so associate, as unto the other justices of oyer and terminer, and shall be in this sort:

2 H. H. P. C.
23.

The king to his beloved A. B. and C. and H. greeting: Whereas lately upon the complaint of D. suggesting to us that E. F. and G. and certain other malefactors, &c. (until) against our peace, we assigned you the aforesaid A. B. and C. and two of you our justices, &c. (until) to hear and determine according to the law and custom of our realm, and afterwards associated H. to act with you the aforesaid A. B. and C. and two of you, in the premisses: we command you, if you all cannot be conveniently present to act in the premisses, then that three, or two of you, who shall happen to be present, proceed to act in the premisses according to the law, &c. Witness, &c.

D And if the king make A. B. and C. commissioners of oyer and terminer, and afterwards by another writ associate unto them J. of H. who is admitted, &c. and afterwards J. of H. die; the king may make a new association of other persons to the first justices; so that association shall be made and granted after association; and he may make association of two or three persons unto the first commissioners, or to those of them who are living, to continue

2 Hawk. P. C.
24, 5.

Post. 113. C.

nue the proceedings, and to proceed to hear and determine the whole matter, and that they do admit those he doth associate, or two or any of them to proceed upon the whole matter; and such writ is in the Register; and by that it appeareth, that by the death of any of the commissioners, the matter shall not be discontinued; and the writ of association shall be patent, and the writ directed to the justices of *oyer and terminer* to admit the others in their society shall be close.

And if a trespass be done unto one in the confines of two counties, then the party may sue a commission of *oyer and terminer* directed to certain persons, to hear and determine the matter; and the form shall be such: E

The king to his beloved, &c. We have received information from the grievous complaint of D. that G. with force and arms took and carried away the goods and chattels of him the said D. to the value of one hundred pounds, found at M. R. and N. which are in the confines of the counties of Norfolk and Suffolk, &c. (until) our justices to inquire by the oath of honest and lawful men of the counties aforesaid, by whom, &c. For we have commanded our sheriffs of the counties aforesaid, that at certain days and places in the confines of the counties aforesaid, which, &c. they cause to come before you in the confines of the same counties, so many and such honest and law'ul men, &c.

[112]

And the writs directed unto the sheriffs of those two counties shall be close.

And a commission of *oyer and terminer* was granted upon a rescous made upon the king's bailiff, where he distrained for debts or amercements to the king, and rescous was made upon him. A

And the king may grant certain commissions *de oyer & terminer* of divers trespasses done by any person at the suggestion of divers persons, without nominating any in the commission, and then the form of the commission beginneth in this manner: B

The king to his beloved, &c. From the clamorous complaints of divers men of the county of N. often coming to our hearing, that the bishop of Winchester, &c. many and divers oppressions, &c. And he shall have the like writ unto the sheriff to return the panel.

And

- C And if a man have goods and merchandise in any ship upon the seas, which ship is broken by tempest, and the goods are cast upon the land, but are not wreck, because certain persons came alive to the land, and the merchandises, or goods, are taken by malefactors unknown, &c. the party may have a commission of *oyer and terminer*, directed unto certain persons, to inquire of those who did the trespasss, and to hear and determine the same, and to make restitution unto the party, and a writ unto the sheriff to return *probos & legales homines*, &c. before the said justices, &c.
- D And a man may have commission of *oyer and terminer* to inquire of extortions, oppressions, and other misdemeanors of under-sheriffs, escheators, bailiffs, clerks of the market, and all other officers, upon the complaint and suit of any one that will sue, and a writ unto the sheriff to return a jury before the said justices.
- E And also the king may direct his writ unto the sheriff, or unto mayors or bailiffs, to do as much as in them lieth and appertaineth to them, to remove such persons from their office, against whom it is supposed that any one will complain; or that he doth not put such or such into any office, until inquiry be made of their carriage and behaviour, &c.
- F And if a man sueth a commission of *oyer and terminer* against divers persons for taking his goods and chattels, which they afterwards waste, spend, or eloin; then the party who sued out the commission shall have a writ unto the sheriff, reciting the matter, commanding him to stay the goods, and to put them into safe custody, until it be otherwise provided and adjudged by the justices of *oyer and terminer*, or by other justices to be after assigned. And upon that commission of *oyer and terminer*, if it be found for the plaintiff, the justices may make restitution of the goods to the party or give him damages for them; and therefore it varieth from the action of trespasss sued before the justices of the king's bench, or the common pleas.
- G And if, during the vacancy of a bishoprick, any person hunt in the parks and chases of the bishop, the king may

may send his commission of *oyer and terminer* to certain persons, to enquire, hear and determine thereof; and the writ shall be such:

The king to his beloved, &c. Know ye, that we have assigned you and two of you our justices to enquire, &c. of the county, &c. by whom, &c. what malefactors and disturbers of our peace, with force and arms broke the parks of S. H. and A. in the county aforesaid, after they came to our hands, by reason of the present vacation of the bishoprick of Chichester, and in them, without our licence and will, chased and took and carried away the wild animals, and other wrongs to us there did, to the loss and contempt of us, and against our peace, and of the truth of the trespass aforesaid more fully, and those trespasses to hear and determine according to the law, &c. And therefore we command you, that at certain days, &c. you make that inquisition, and the trespass, &c. determine in form aforesaid, &c. For we have commanded, &c. and inquired, &c. Witness, &c.

And if in the time of the vacancy of the archbishop-Hrick, any person hunt in the parks, or cut down the woods, or fish in the piscaries of the bishoprick, &c. when the archbishop is created, the king may send and grant a commission of *oyer and terminer*, to inquire and determine the trespass in the time of the vacancy; and the form of the commission shall be,

The king to his beloved, &c. We have received information from the grievous complaint of the venerable father W. archbishop of York, that certain malefactors, &c. the parks, &c. (and recite in the commission all the trespass especially) and other wrongs, &c. in manifest contempt of us, to the prejudice of the archbishoprick aforesaid, and the great damage of the said archbishop, and against our peace; and because the contempt and trespasses, &c. unpunished, &c. we have assigned you, &c. to hear the contempt and trespass, as well at the suit of us, as of the aforesaid archbishop, &c. to determine according to the law, &c. And therefore we command you, &c.

But it is proper to see how it stood with the statute of *Marlbridge, cap. 28.* that the bishop should have an action and punish a trespass done in the vacancy of the bishoprick: but it seemeth it shall be so by these words in
the

the statute, *Quod si rapinae aliquae factae sunt abbatibus vel aliis praelatis ecclesiasticis*. And in the end of the statute are these words, *Si autem in terris et tenementis hujusmodi religiosorum de quibus eorum praelati obiere seifiti ut de jure ecclesiae suae aliqui se intrudent tempore vacationis, &c.* And it seemeth these words *hujusmodi religiosorum*, shall extend to bishops: as much as to say, the bishop shall punish a trespass done in time of vacation of the bishoprick, in cutting down trees, &c. for of right the king cannot cut such trees; but for hunting in the parks, or fishing in the piscaries, it seemeth the king ought to have the action for the trespass done in the time of the vacancy; but if they destroy all the fish within the fish pools, or all the deer in the parks in the time of the vacancy, it seemeth reasonable, that by the statute of *Marlebridge*, the successor should have an action for such trespass: *quære* of this matter.

[113]

A And it is intended, That the king of right ought to keep and defend his kingdom as well against the sea, as against enemies, that it be not drowned or wasted, and to provide remedy for the same: and also to provide that his subjects pass by all ways through the kingdom with safety; and therefore if the sea walls be broken, or the sewers or gutters not scowred, so as the fresh waters cannot have their courses, the king ought to grant a commission to enquire thereof, and to hear and determine the defaults; and the form of the commission is such:

The king to his beloved A. B. and C. &c. Whereas the walls, ditches, gutters, sewers, bridges, causweys, gulfs, and trenches in the parts of Holland between the cross of W. and the bridge of E. are in many places in the parts aforesaid, so thrown down and broken by the violence of the sea, and the reflux and inundation of fresh waters, that very many and inestimable damages for want of reparation of the same walls, ditches, gutters, sewers, bridges, causweys, and gulfs, and by obstruction of the trenches aforesaid, have happened there in times past, and greater are feared to happen in process of time, unless a speedy remedy be thereupon in due time applied: we, because we are bound by reason of our royal dignity, to provide for the safety of our realm on every side, willing to apply a fit and speedy remedy
in

in this behalf, have assigned you to supervise the walls, ditches, gutters, sewers, bridges, causweys, gulfs, and trenches aforesaid, and to inquire as well by the oath of knights, as of other honest and lawful men of the parts aforesaid, as well within liberties as without, by whom, &c. may be better known, by whose default such damages have there happened, and what lands and tenements they hold, or common of pasture, or fisheries in those parts, or what defence, benefit and safety they have, or after any sort soever may have by the walls, ditches, gutters, sewers, bridges, causweys, gulfs aforesaid, and also the damages they sustain or may sustain by the trenches aforesaid; and all those persons, according to the quantity of their lands and tenements, either by the number of acres, or by ploughlands according to the proportions of their tenures, or by the quantity of their common of pasture or fisheries there, to distrain, and by amercements, and in other manner as you shall see better to be done, to punish them, together with the bailiffs of liberties and others of those parts, to repair such walls, ditches, gutters, sewers, bridges, causweys, and gulfs in the places necessary, and as often as, and when need shall be, to make of new, and the trenches aforesaid, in places necessary, to stop up, so that any tenants of such lands or tenements, or having common of pasture, or fishery, rich or poor, or of whatsoever high condition, state, or dignity they shall be, who may have any sort of defence whatsoever by the aforesaid walls, ditches, gutters, sewers, bridges, causweys and gulfs, or also sustain or may sustain damage by the said trenches aforesaid, whether they be within liberties or without, be not spared in this behalf: and therefore we command you, that at certain days and places which you, &c. shall appoint for this purpose, you supervise the aforesaid walls, ditches, gutters, sewers, bridges, causweys, gulfs and trenches, and do and fulfill all and singular the premisses in form aforesaid, and that you cause firmly to be observed all things which shall happen to be ordained and done by you in this behalf, as well within liberties as without. For we have commanded our sheriff of Lincolnshire that he cause to come, &c. so many and such, as well knights as other honest, &c. as well within liberties as without, by whom the truth of the matter may be better known, &c.

Ant. 111. D.

And upon this commission, a writ shall issue to the A
sheriff, rehearsing the whole matter in the commission,
com-

commanding him to return a jury, &c. as appeareth by the commission. And if the justices shall sit by virtue of that commission, and take divers presentments and indictments, and award process upon them returnable at a certain day, and afterwards all the justices or some of them die, the king may grant a new commission to the justices which are living only, or unto others, rehearsing the death of him who is dead, or of those who are dead; commanding them to continue the proceedings begun, and to proceed upon that process, and to hear and determine all those defaults and offences in the said commission, the king reciting, that he hath sent unto the executors of those who died, to send all the rolls, records, and process before the new commissioners. And upon that commission, the king shall send a writ unto the executors of the justices who are dead, to send the rolls, records and process as aforesaid, forthwith under their seals; and another writ unto the sheriff to make a panel, and to return the same before the new commissioners, and upon that commission the justices shall make a precept unto the sheriff, that at a certain day and place he return before them the panel according to their commission, and that he be there before at the same day with the precept. And this new commission shall be made as well to continue the suits and process betwixt party and party, sued before the justices of *oyer and terminer*, as well as the indictments and presentments made and found for the king. And the king may put into the commission a command unto the said commissioners, to receive the records and the rolls, and process of the said executors. But see the statutes of sewers, and especially the statute of King *Henry the Eighth* for that matter.

[114]

10 Co. 141,
142.

B (a) And if an *English* merchant be robbed, and his goods be taken from him beyond the seas by merchants

(a) See a commission for piracy on the stat. of 28 H. 8. cap. 15. to be named by the admiral or lord keeper, *Dyer* 212. and see the like com-

mission at common law, *de captis a Francis post differenciam.* Rot. Pat. 26 Ed. 1. M. 24. dorso.

strangers, and the *English* merchant sue beyond sea to have justice and restitution made thereof, and cannot obtain it, and this matter be testified unto the king in his chancery by divers credible persons; now upon this testimony, if the merchants strangers come into any place within the realm of *England* with their goods; then the *English* merchant shall have a writ out of the chancery, directed unto the mayor or bailiffs, where such merchants strangers are with their goods, to arrest them and their goods, and to keep them under arrest, until they have satisfied the party his damages, which he hath sustained by reason of their misdoing. And may have divers writs, directed unto divers ports or towns, unto the mayor or bailiffs thereof, to arrest such merchants and their goods; and to detain them, until they have satisfied the *English* merchant for the trespass which they have done unto him beyond the seas. But it seemeth the *English* merchant shall not have such writ, for any debt due to him from a merchant stranger, upon a contract made beyond the seas, if the merchant do come into *England*, or his goods; *quære tamen* thereof. And the king shall recite in his writ, which is directed unto the mayor or bailiffs, &c. that he hath sent the like writ unto the mayor or bailiffs of such a town, and another writ unto the mayor or bailiffs of the other town, in the like manner; and this writ shall be sued to attach all those who did the trespass, and their goods unto the value of the trespass, which he supposeth he was endamaged.

And if certain persons ought to account unto a corporation, as if the king grant, to the honest men of the town of *N.* a certain sum, out of things which come to the same town to be sold, and there are collectors to gather the same, who do so; the king may grant a commission to certain persons, to enquire what persons have received such sums, and to hear and determine the matter, and to hear their accounts thereupon, and do in that case as auditors would do; and he shall send a writ unto the sheriff to return a jury before the same justices at the day, &c. which they appoint, &c. to enquire thereof, and the commission is in the end of the writ *ex parte talis*, and before the writs of debt, in the Register. C

Writ of Conspiracy.

18 Ed. 4. 1.

Conspiracy

against two, one

dieth pendent the writ, per curiam, the writ shall not abate; and note by Finchden 43 Ed. 3. 32. that one shall answer if he appear.

D **A** Writ of (a) conspiracy lieth where two, three, or more persons of malice and covin conspire and devise to indict any (b) person falsely, and afterwards he who is so indicted is acquitted; now he shall have this writ of conspiracy against them who so indicted him. But this writ lieth against two persons at the least who so conspire; for if one person of malice and false imagination labour and cause another falsely to be indicted, the party who is so indicted, shall not have a writ of conspiracy, &c. but an action upon the case against him who so caused him falsely to be indicted.

Vide statute

33 Ed. 1.

de Conspirati-

onibus.

Vide after E.

F. G. Conspi-

racy shall be

against one, &

e contr. Note;

if the action be

brought against

divers, and all

but one are ac-

quit, the action

faileth. 28 Aff.

12. so if all but one are discharged by matter in law

E If two men conspire to indict another, and he be afterwards indicted, and he bring appeal upon the indictment, and be nonsuit upon his appeal after declaration or before declaration, the party who was falsely indicted shall have a writ of conspiracy, because he is arraigned after the declaration upon the appeal, and is acquitted, and before the declaration upon nonsuit he shall be arraigned upon the indictment, and if he be acquit, he shall have a writ of conspiracy, &c. But if he be falsely indicted, and after an appeal is sued upon that indictment, and he put no an-

(a) One may be indicted of a conspiracy at the suit of the king, and then he shall have a villainous judgment. 24 Ed. 3. 34. 73. 43 Ed. 3. 33. But at the suit of the party he shall be only taken. 27 Aff. 59. Judgment on indictment of conspiracy as in attain. 4 H. 5. Judgment 220. See the form of the judgment, where the party was convicted, &c. on indictment. 46 Aff. 11.

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C c

(b) Note; If he be acquitted by matter in law, but not of the fact, &c. as for that he did it *se defendendo*; or that he did it by pretext of an arrest for felony, and he resisted, and thereupon he killed him; in this case no conspiracy lies, because no malice. 22 Aff. 77.

fwer

34 H. 6. 9.
per Prisot.

Note; this case
proves that con-
spiracy lieth as
well upon appeal
as indictment
for he is arraign-
ed upon the ap-
peal, Stamford
172. that is,
indicted at the suit of the king.

swer un'o the appeal, and afterwards be acquitted by ver-
dict upon the appeal, he shall not have a writ of conspiracy
in that case, because he is acquit upon the appeal, and not
upon the indictment, &c. But upon nonsuit in the ap-
peal a conspiracy doth lie for the cause before men-
tioned.

19 Ed. Fitz. Conspir. 12. 5 Ed. 3. ibid. 22.

5 Ed. 3. Con-
spiracy 22.

13 Ed. 3. Con-
spiracy 25. the
abettors shall
not be enquired
of but where the
abetment is
found by enquest.
19 H. 6. 19.
and 4 H. 6. 23.
Null tiel record
is a good reply
in conspiracy.

(a) And if two conspire to cause a man to sue an ap- F
peal against another of felony or murder, without any in-
dictment taken or found thereof, and after the defendant
is acquitted by verdict, he shall not have a writ of conspi-
racy against those who conspire to appeal him, because
that by the statute of *West. 2. c. 12. Quia multi per ma-*
litiam, it shall be enquired of abettors, if he be not indicted
thereof; and if they be found, he shall have a *scire facias*
against them, out of the same court where he is acquitted,
to render him his damages: and for that reason he shall
not have the writ of conspiracy. And so if he be (b) G
non-suited in any such appeal, where there is not any in-
dictment, the defendant shall have a writ of conspiracy
after the nonsuit or after the acquittal: but the form of
the writ of conspiracy where he is acquit by verdict, doth
vary in words in the end from the writ of conspiracy
which is founded upon the plaintiff's nonsuit in appeal;
for one writ founded upon the verdict is, *Until according to*
the law, &c. he was acquitted; and the other writ of con-
spiracy founded upon the plaintiff's nonsuit is, *Until the*
same complainant by consideration of our court departed quitted
thereof. The form of which writ follows:

[115]

(a) Nor shall one have conspi-
racy, if he be indicted or appealed,
and arraigned and acquitted on the
appeal. 33 H. 6. 2. yet note; a
monk was appealed of robbery and
acquitted; he and his abbot shall
have a writ of conspiracy, though he
was acquitted by verdict, &c. 24 Ed.
3. 73. *Ratio*, for that the abbot,

though not party, shall have a *scire*
facias, for the default of the party on
the original.

(b) See 13 Ed. 3. *Conspiracy* 25.
17 Ed. 2. *ibid.* 26. *Ratio*, because the
writ is given on a nonsuit in appeal,
and for that there is an enquiry of the
abettors.

The

The king to the sheriff, &c. If A. shall make you secure, &c. then put, &c. B. and C. that they be before us, &c. to shew (c) wherefore having before conspired together at N. they falsely and maliciously procured the aforesaid A. to be indicted of stealing, taking and leading away a certain beast at N. and him to be taken upon that occasion and to be detained in our prison of Warwick, until in our court before our beloved and faithful R. and S. our justices assigned to deliver our gaol of Warwick, according to the law and custom of our realm he was acquitted, to the great damage of him the said A. and contrary to the form of the ordinance in such case provided. And have there the names of the pledges and this writ. Witness, &c. 22 Aff. 77.

The other writ founded upon nonsuit in appeal is such :

The king to the sheriff, &c. If A. shall make you secure, &c. then put, &c. B. and C. that they be before us, &c. to shew wherefore having before had conspiracy between them at N. they falsely and maliciously procured the aforesaid A. to be appealed of the death of D. lately slain at E. and him the said A. to be taken upon that occasion and to be detained in our prison of L. until in our court before us the same A. &c. by the consideration of our court departed quitted thereof, &c.

A And if a man cause one as principal to be appealed of felony or murder, and another as accessory to him, and afterwards be nonsuit in his appeal, the accessory shall have a writ of conspiracy as well as the principal.

And if the principal, and one who is accessory, be indicted of felony, and be taken and arrested, and the principal be indicted and acquitted, by that the accessory is discharged, and the accessory thereupon shall have a writ of conspiracy against those who conspired to indict him, and the writ in the end shall say, *Quousque idem* (the principal) *secund' leg'*, &c. *acquietat' fuisset*, & *idem* (the accessory) *quietus recessit*.

B (a) And a man shall have a writ of conspiracy upon an

33 H. 6. 1.
34 H. 6. 9.
cont. if the
principal die be-
fore he be at-
tainted.

(c) *Conspiraverunt, & confederaverunt*. 19 R. 2. Brief 926.

(a) See 27 H. 8. 2. 12 Ed. 4.
17. 7 H. 4. 1. 21 Ed. 3. 47. 21
Ed. 4. 1. 8 H. 4.

20 H. 6. 5.

indictment before any mayor, bailiff of any city or borough, who have gaol-delivery within the city or borough, if he be acquitted before them, &c. for that acquittal discharge him of the felony. But a writ of (b) conspiracy doth not lie against the indictors, &c.

7 H. 4. 31.

8 H. 4. 6.

21 Ed. 3. 19.

47 Ed. 3. 17.

27 H. 8. 2.

20 H. 6. 5.

& 33.

35 H. 6. 14.

& 19.

14 H. 6. Conspiracy 1.

If jurors be sworn to enquire, &c. and afterwards one of them be discharged by the justices, he shall not be punished for what he did when he was sworn: but if he conspire after, he may be charged for the same in a writ of conspiracy. (c)

And he who cometh into court, and discovereth felonies, and is sworn to give evidence to the jury, is not chargeable in conspiracy. (d)

In a conspiracy against two, one pleaded to the writ, and the other (e) matter in law, which is adjudged for him, and the plea unto the writ found by verdict against him who pleads it; the plaintiff shall have judgment against him who pleaded to the writ: but if both had pleaded not guilty, and (f) one had been found guilty, and the other no, there the plaintiff should not recover, for then he did not conspire as is supposed by the writ. But it may be that they did conspire in the case aforesaid, although the matter in law be adjudged for the defendant. And if the principal die before any verdict given upon the acquittal, or have a pardon and plead it, then the accessory shall not have a writ of conspiracy, because he is discharged by the

Conspiracy against two, one is attain, the other makes default, judgment shall be against him, 24 Ed. 3. 34. but quære by Stamford 174. for 27 Ed. 3. it is holden, that one shall not answer without the other.

(b) *Quære*, If the jurors in such case shall be punished, if they conspire before the indictment. 47 Ed. 3. 16. 12 Ed. 4. 67. that they shall not. 27 Aff. 12.

Quære, If the jurors procure themselves to be impanelled. 9 H. 4. fol. ult.

(c) See 20 H. 6. 33. *Stamf.* 73. 20 H. 6. 34. *N. B.* 57. *contra.*

(d) See 27 Aff. 12. 27 H. 8. 2. 37 Aff. 12. 35 H. 8. 15.

(e) See 14 H. 6. 15. accordant, for it may be a conspiracy.

(f) See accordant 33 H. 6. 1. 8 Ed. 3. 17. 8 H. 6. 1. 28 Aff. 12. 11 H. 4. 2. but if one be found guilty, and the other makes default, 24 Ed. 3. 73. or be dead, 18 Ed. 4. 1. there he shall have judgment against the one, though he had released to the other. 22 R. 2. *Brief* 888.

death

death of the principal, or by the pardon to the principal.

G If a man be falsly indicted of felony, and afterwards by act of parliament a general pardon is granted of all felonies, the party now (a) shall not have a writ of conspiracy, although he will plead unto the indictment and is acquitted, and will not plead the act, &c. because his life was not in danger, and the felony was discharged by the act.

H The justices of gaol-delivery arraign a prisoner for murder within the year, where an appeal is depending against the same prisoner, for the same murder, which they know, (b) and yet they proceed and acquit him, he shall have a conspiracy, although he was not acquitted nor discharged of the appeal: see the statute of *An. 3 H. 7. cap. 1.* And before that statute it was holden, *21 H. 6.* by *Paston* and *Newton*, that he should have a conspiracy; for they said he should have been hanged if he had been found guilty upon the arraignment on the indictment. And so the statute *de conspiratoribus, temp. Ed. 1.* which statute doth not determine in what cases a conspiracy shall lie. But by the statute of *4 Ed. 3. cap. 10.* it is provided that the justices of *nisi prius* and of assise, shall have power to hear and determine conspiracies, confederacies and champerties, and such as they cannot determine upon the *nisi prius* for shortness of time to adjourn into their respective courts that they may be there determined.

21 H. 6. 28,
29. 17 Aff. 1.
Br. Appeal 55.
Rastal nisi prius
5. and note that
before that sta-
tute, they can-
not arraign them
at the king's
suit.

And if a man be indicted or appealed of treason or felony, or a trespass done in a foreign country, &c. if he be acquit thereof, he shall have a conspiracy against him who

(a) See accordingly by *Markham*, if the indictment was abateable. *19 H. 6. 29. 9 Ed. 4. 12. 21 H. 6. 29.*

(b) It seems sufficient if the writ be delivered to the sheriff, who opens it and reads it to the justices; but if they have no notice, it is clearly no plea: and see there, if the son of one

outlawed, or his wife brings an appeal of the death of his father, and the party is acquitted, he shall be after arraigned at the king's suit; otherwise by *Newton*, if the younger son brings an appeal. But in both cases he shall be again arraigned at the party's suit. *21 H. 6. 28, 29.*

procured him to be indicted or appealed, and shall recover treble damages by the writ upon the statute of 8 H. 6. c. 10.

And if a man be indicted of felony or treason, where there is not any such place within the county, he shall have conspiracy, and recover his damages against the abettors and procurers or conspirators, by the statute of 18 H. 6. cap. 12.

And the form of the writ for the accessory in a writ of conspiracy is,

[116] *Wherefore having before conspired together, &c. they falsely and maliciously procured the aforesaid A. to be indicted because he had abetted and procured D. who was the wife of E. F. and G. to be appealed of the death of E. her late husband, before J. and his companions lately our justices to hear and determine that appeal, and him to be taken and imprisoned upon that occasion, and to be detained in our prison of Lincoln, until he was acquitted thereof before our aforesaid justices according to the law and custom of our realm, &c.*

And there are divers other writs of conspiracy grounded A upon disceit, and trespass done unto the party, which are properly actions of trespass upon the case; as if two men conspire to indict another man because he did not arrest a felon, who passed by the town of N. and because they caused him to be indicted and amerced in the leet of R. and F. and took and imprisoned him for that amercement until he were acquitted in the said leet.

4 Co. 18.

And if men say and affirm unto A. that he hath right B unto such land, and procure and cause him to sue an action for the same against B. who is tenant of that land, &c. by which he is of necessity compelled to sell other lands or tenements for the defence of his land, &c. now he shall have an action (a) against those who procure or conspire to cause A. to bring his action, &c.

And if two men procure or cause one to be indicted C for hunting in another's park, for which he is taken, im-

(a) See *contra* 38 Ed. 3. 3. And that he ought to shew in his writ who sued the action.

prisoned,

prisoned, and put to charges, until he hath acquitted him of the trespass, he shall have a conspiracy against them (b).

D And conspiracy shall be maintainable against those who conspire to forge false deeds which are given in evidence, by which any person's land is lost.

46 Ed. 3. 20.
39 Ed. 2. 13.
Fitz. Conspi-
racy 9.
42 Ed. 3. 14.

E Conspiracy shall be maintainable against those who conspire to bring an assise in the name of the plaintiff against a defendant, and to make one attorney for the plaintiff, in which assise the plaintiff was found villain, &c. now he may bring this writ of conspiracy.

F And conspiracy shall be maintainable against those who conspire to indict one of trespass, &c. whereof he is acquitted, &c.

3 Aff. 13.
11 H. 7. 25.

G And conspiracy shall be maintained, where the defendant makes one present in the name of the plaintiff unto an advowson, and upon that present unto the bishop, who is admitted and instituted, &c.

40 Ed. 3. 19.

H If one conspire to cause a false office to be found of my land, which is found by his procurement, &c. I shall have a writ of conspiracy.

47 Ed. 3. 15.
But the office
ought to be suffi-
cient.

I In a conspiracy against two, one justifies because he was then justice by commission, when the plaintiff was indicted before him, &c. and for any conspiracy before, he pleads not guilty.

K And a writ of conspiracy for indicting of felony doth not lie but against two persons at the least; but a writ of conspiracy for indicting one of trespass or other falsity made, as in the cases aforesaid, lieth against one person only.

8 H. 4. 6.
11 H. 7. 26.
Vide supra 114.
D.
Infra L.

L And a man shall not have a writ of conspiracy for indicting him of felony, against husband and wife, because they are but one person; but against husband and wife and a third person it well lieth. *Stamf.* 174.

38 Ed. 3. 3.

But if the writ of conspiracy be brought against two, then it shall be said properly a writ of conspiracy. But

(b) 7 H. 4. 31. 3 Aff. 6. 11 H. 7. 26.

if it be brought against one person only, then it is but an action upon the case upon the falsity and deceit done, because one person cannot conspire with himself.

9 H. 6. 30.
22 H. 6. 49.

And the writ of conspiracy may suppose the conspiracy **M** to be in two several places, and shall be good; and the writ ought to be brought in the county where the conspiracy is made, and not where the indictment was, or where the deed was done, &c.

There is also another writ of conspiracy which is given **N** upon the statute called *Articuli super Chartas*, 28 Ed. 1. cap. 10. which writ shall be directed unto the justices of assise to enquire of the conspiracy; and the writ shall be such:

The king to his beloved and faithful W. of S. and his companions, &c. assigned, greeting: Whereas among other articles which Lord Edward formerly king of England our grandfather granted for the amendment of the estate of his people, it is ordained, that of conspirators, false informers, and evil procurers of dozens, inquests, assises, and juries, the justices of the one bench, and the other, and justices assigned to take assises when they come into the country to do their office, shall upon every plaint made unto them award inquests thereupon without writ, and shall do right unto the plaintiff without delay, as in the articles aforesaid is more fully contained: We, willing that the said articles be in all things inviolably observed, command you that, having looked into the ordinance aforesaid, you further do, at the prosecution of all and singular persons complaining before you, that, which according to the form of the ordinance aforesaid shall be fit to be done. Witness, &c.

And upon that he shall have an *alias* and a *pluries*, and **O** attachment against the mayor or sheriff, &c. if they do not according to the writ sent unto them, or return the cause why they cannot do the same; and it seemeth reasonable that the party in prison should have an action upon that statute against the recognizor, if he find him not bread and water in prison, &c. according to the statute.

(a) Writ of Account.

P **A** Writ of (b) account lieth divers ways; for if a man make one his bailiff of his manor, &c. he shall have a writ of account against him as bailiff. 9 H. 6. Account 8.

And if a man make one his receiver, to receive his rents or debts, &c. he shall have a writ of account against him as receiver. 6 R. 2. Belk. Account 47.
14 H. 4. 30.

And if a man make one his bailiff, &c. and also his receiver, then he shall have an account against him as bailiff, and also as receiver.

Q (c) A man shall have a writ of account against one as bailiff or receiver, where he was not his bailiff or receiver;

(a) *Note*; No damages shall be in account, because all shall be cast, considered by the auditors as arrearages. 7 H. 6. 36. per Martyn. 2 R. 2. Account 45.

(b) *Note*; The writ and count *a tempore quo fuit ballivus manerii de S. & habuit administrationem bonorum, &c.* if it be found *quod habuit administrationem bonorum*, although he be not *ballivus manerii*, the plaintiff shall recover, because there is no other writ. *Kelw.* 114. So *ballivus domus* shall be charged for goods delivered to him as bailiff in account. 2 R. 2. Account 46. See an account against a bailiff of woods, and of what things he shall answer, 34 Ed. 3. *ibid.* 131. See 9 Ed. 4. 40. 9 Ed. 3. 37.

(c) If a man holds certain lands of me by the service of being my bailiff of my manor, I shall have account against him, though he never took the profits, because he is my bailiff by his tenure; per Fitzb. 18 H. 8. 5.

If I deliver a tun of wine, or last of herrings, &c. to sell, and the bailiff

sell them; I shall not have account against him for the money as receiver, for he had no allowance of costs for his labour; but I may have account against him as bailiff. 43 Ed. 3. 21. 46 Ed. 3. 9. 4 H. 6. 27.

Note; A bailiff shall have allowance of casual things of common course, paid or done by him without any command, as for relief; but not for other casual payments, if he has not a special command, &c.

Note; A bailiff shall not have account against his master for a surplus on account. 41 Ed. 3. Account 33. *Quere.*

Note; A receiver of monies is not compellable to make adventure, for doubt of loss; and therefore if he makes oath, that he did not find any thing that he dared to buy for doubt of loss, the plaintiff shall be thereby bound to receive his principal sum; for if he had loss, the master is bound to sustain it. 46 Ed. 3. Account 40.

29 H. 6. Fitz.
Account 6.
36 H. 6. 10.
10 R. 2. Ac-
count 45. ac.

for if a man receive (*d*) money for my use, I shall have an account against him as receiver; or if a man deliver money unto another to deliver over unto me, I shall have an account against him as my receiver.

(*e*) And so if a man enter into my land to my use, and receive the profits thereof, I shall have an account against him as bailiff. A

Vi. 43 Ed. 2.
21. Thorpe.

And so if relations occupy the land of an infant, which the infant hath purchased, or hath by purchase, the infant shall have an account against them as bailiff of his lands; and this writ of account may be sued as well in the county as in the common pleas. B

19 Ed. 3. Fitz.
Account 56.
The writ of ac-
count is given to
executors by sta-
tute, and was not
at the common
law.

If a man have cause of action of account against one as bailiff or receiver, if he die (*a*) his executors shall have the action: but an account doth not lie against (*b*) the executors of a bailiff or receiver, for the receipt or occupation of their testator. And the writ of account which shall be sued in the county, is a *justicies* directed unto the sheriff, which is such (*c*): C

The king to the sheriff of Lincolnshire, greeting: We command you that you justice A. that justly and without delay

(*d*) Yet if one receive to my use, money sealed up in a bag, as my servant, account does not lie against him. 29 Ed. 3. 20. 20 H. 6. 16. See 6 H. 4. 8. 2 H. 4. 12. 13 H. 4. 1. 41 Ed. 3. 10. 22. 33 H. 6. 2. 6 Ed. 3. 12. *F. Baily* 4.

(*e*) Account lies against him who receives my rent without my appointment, 11 H. 4. 65. *per Thinn.* but not against him who enters into the lands of one of full age, or an infant not tenant in socage, 13 Ed. 3. 35. *Dyer* 277. but in the king's case he shall be charged as bailiff, if he has no title. 33 H. 6. 3. *per Prisot.* 4 H. 7. 6.

(*a*) And so of a successor, &c. 31 Ed. 3. Account 57, & 124. con-

tra of an heir. 19 Ed. 3. *ibid.* 56. See 10 H. 7. 10. Stat. W. 2. c. 23. and the executor of an executor, 25 Ed. 3. 5. and to an administrator. 31 Ed. 3. 11. See *Co. Lit.* 89. *b*.

(*b*) But if the bailiff's executors do account with *J. S.* of their own agreement, *J. S.* shall have debt on the arrears or balance of such account. See account against them as executors, 2 H. 4. 13.

(*c*) Account against a bailiff, shall be brought in the county where he was bailiff, but against a receiver it may be in any county. 30 Ed. 3. 20. See account *de tempore quo fuit receptrix vel balliva* against a feme, 19 H. 6. 5.

he render to B. (d) his reasonable account for the time in which he was his bailiff in N. and receiver of the money of him the said B. as he can reasonably shew that he ought to render to him, that we may hear no more clamour thereupon for want of justice. *Witness, &c.*

And for executors the writ is,

That he render to B. and C. executors of the testament of D. his reasonable account for the time in which he was the bailiff of him the said D. in N. and receiver of the money of him the said deceased, as he shall reasonably shew, &c.

D If two merchants occupy their goods and merchandizes in common unto their common profit, one of them shall have an action of account against the other in the county, or in the common pleas; and the writ in the county shall be,

The king to the sheriff, &c. We command you that you justice A. merchant that justly, &c. he render to B. merchant a reasonable account (e) for the time in which he was receiver of the money of him the said B. from whatever cause and contract coming to the common profit of them the said A. and B. as by the law of merchants he may reasonably shew that he ought to render to him, &c.

And this clause *ex quacunque causa & contractu*, ought to be put in every such writ, whether it be sued in the common pleas or in the county.

E And the executor of one merchant shall have such writ against the other merchant, but not against his executor, and the form of the writ in the common pleas is as follows:

for what things he hath accounted. Contra where the writ is, a tempore quo fuit ball'. 3 Ed. 3. Account 61.

Two purchase a manor for life, and one taketh upon him to be bailiff to the other, no account lieth by 8 Ed. 2. Account 115. & 21 Ed. 3. ibid. 66. 30 Ed. 1. Account 127. Note, that in a writ which supposeth that de tempore quo fuit receptor denarium, the defendant shall not say, that he hath accounted from such time to such time, but ought to shew certain

(d) *Note*; This writ lies but in account, and therefore it is a good plea to say, fully accounted with the plaintiff himself, or before auditors, &c. for after such account made, the action of account is gone; but he may have debt on the arrears or balance of the account, 7 H. 4. 14. 34 H. 6. 43. but it ought to be be-

fore auditors, assigned by him with whom the account is. 29 Ed. 3. 40.

(e) See 30 Ed. 1. 127. accordant. 10 Ed. 3. 7. 14 Ed. 3. Account 60. 19 Ed. 2. Brief 839 or 829. Mich. 14 Jac. 1. Rot. 189. in B. R. See also 10 H. 7. 16. 14 Ed. 3. 11 H. 4. 79. contr. 19 Ed. 2. Brief 893. 19 Ed. 2.

The

The king to the sheriff, &c. Command A. that he render to B. a reasonable account for the time in which he was receiver of the money of him the said A. or bailiff of him the said A. and unless he will do it, and the aforesaid A. shall make you secure of prosecuting his claim, then summon the aforesaid B. that he be before our justices at Westminster in fifteen days of Easter, &c. to shew wherefore he will not do it: and have there the summoners and this writ, &c.

And a prior or abbot or master of an hospital shall have a writ of account against him who was receiver or bailiff in the time of their predecessor; and the form of the writ shall be such:

Command A. that he render to I. prioress of S. a reasonable account for the time, &c. bailiff of Alice formerly prioress of S. predecessor of the aforesaid I. and receiver of the money of her the said Alice prioress, &c.

4 Ed. 3. pl. 8.
14 H. 4. Account 124.
4 Ed. 2. 17.
ibid. 97.
31 Ed. 3.
Account 57.
25 Ed. 3. 45.
in the like action
the defendant
said that he was
not receiver of
the predecessor,
and admitted good.
20 Ed. 3. Account 78. Account lies against an abbot notwithstanding the receipt was by the predecessor.

And there is another writ of account thus: *Command A. that he render to the commonalty of the town of W. his reasonable account for the time, &c. in which he was receiver of the money of the said commonalty in W. And unless, &c. And the said commonalty, &c.*

And note, that the writ of account sued in the county, may at the suit of the plaintiff be removed into the common pleas by a *pone*, without any cause shewed in the writ, but shall not be removed out of the county by the defendant, without cause shewed in the *pone*, &c. As if the defendant plead a foreign release, then it shall be said in the *pone*, because the aforesaid defendant in pleading in our court in N. in which the plea dependeth by return of our writ, hath produced a certain writing of acquittance under the name of him the said A. containing in itself that he the aforesaid A. had released all actions which he had against the aforesaid B. the defendant by reason of the account aforesaid, to him the said B. in the county of Lincoln made as it is said, which writing the aforesaid A. hath absolutely denied; wherefore because that plea ought not to be further carried on in the court aforesaid,
let

F

G

let execution of this writ be done, if the cause be true, and otherwise not.

H There is another manner of writ of account founded upon the statute of *Marlbridge*, cap. 23. And that writ lieth (a) where a man ought to make account as bailiff or receiver, and hath no lands nor tenements by which he may be distrained, but is lurking in secret places, where he will not be found, then the plaintiff shall have a writ of account, which is called *monstravit*, upon the statute, and the writ is of this form :

Vi. 4 Ed. 2.
Br. 791.
Where it is holden, if he hath any land, it is sufficient; but there he had in the right of his wife, but 6 s. 8 d. and had not title to be tenant by the curtesy, therefore not sufficient.

The king to the sheriff, &c. The prior of N. hath shewed unto us, that whereas A. was his bailiff in K. having the care and administration of all his affairs and goods, the same A. his account not being paid, seeking subterfuges, lies hid in your bailiwick, nor can he be found and distrained to render to the said prior his account aforesaid: and because by the common council of our realm it is provided, that if bailiffs who are bound to render their account to their lords do withdraw themselves, and have not lands or tenements whereby they may be distrained, they shall be attached by their bodies, so that the sheriff in whose bailiwick they be found, shall cause them to come to render their account; we command you, that if the aforesaid prior shall make you secure of prosecuting his claim, then attach the aforesaid A. so that you may have him before our justices, &c. such a day, to render to the aforesaid prior his account aforesaid, as he shall reasonably shew that he ought to render to him, &c. And have, &c.

But this writ is not now in use, because that by the statute of *West. 2. cap. 12.* made after the statute of *Marlbridge*, process of outlawry is given in a writ of account against bailiffs and receivers; but yet he may sue a *monstravit* at this day, if he will; and the form of the writ of *monstravit* directed unto the sheriffs of *London* is such :

[118]

(a) And note, that lands of which he is seised in right of his wife, are not lands within the statute, on the point in issue, whether he had suffi-

cient lands, 4 Ed. 2. Brief 791. in the same county. 6 Ed. 2. Brief 806.

The king to the sheriffs of London, greeting: A. hath shewed unto us, that whereas B. was receiver of the money of him the said A. and his bailiff in N. the same B. his account not being rendered, seeking subterfuges, lies hid in your bailiwick, &c.; we command you, that if the aforesaid A. shall make you secure of prosecuting his claim, then attach the aforesaid B. so that you may have him before the mayor of our city of London and yourselves, at your next hustings in London, to render to the aforesaid A. his account aforesaid, as, &c. And have, &c.

And the receivers and bailiffs may be put in one writ in the *monstravit*, thus: *receiver of the money of him the said A. and his bailiff in N.* But if the writ be sued in the common pleas, then the bailiff must be put, *As his bailiff and receiver of the money of him the said A. in N.*

See that in account against one as bailiff and receiver, the defendant said, that he was guardian in socage, and not bailiff, and good; per 32 Ed. 3. Account 60.

(a) And a writ of account lieth against guardian in A socage; but the form of the writ varieth from the form of the writ against the bailiff, &c. and the form is such:

The king to the sheriff, &c. If A. shall make you secure, &c. then summon, &c. B. that he be before our justices, &c. to shew wherefore, whereas it is provided by the common council of our realm, that guardians of lands and tenements (b) which are holden in socage, shall give to the heirs of those lands and tenements (c), when they shall come to full age, their reasonable account of the issues forth-coming of those lands and tenements, for the time in which they had the wardship by reason of the minority of the heirs aforesaid, he the said B. refuseth to render to the aforesaid A. his reasonable account of the issues forth-coming of his lands and tenements in N. which are holden

13 Ed. 3.
Account 77.

(a) No *capias* or exigent lies in account against a guardian, 17 Ed. 3. 50. but if the defendant comes in by *capias*, he shall be put to answer, for it is only a miscontinuance. 29 Ed. 3. 5.

(b) And therefore it is a good issue, *quod non tenentur in socagio*, 13 Ed. 3. Account 77. 22 Ed. 4. 5. that they

are held in chivalry *per defendentem & non in socagio*. 11 H. 6. 7.

(c) And so note; The occupation charges him, though he be not *prochein amy*, 29 Ed. 3. 5. 4 Ed. 3. 107. accordant. But it seems *contra* if he held in chivalry, although the party has no colour. 13 Ed. 3. *ibid.* 77. Co. Lit. 89.

in socage, and whereof the same B. had the wardship while the
aforesaid A. was under age, as it is said; and therefore,
&c.

Notwithstanding
that he be no
guardian in droit,
if the defendant
hath the occupa-
tion or manu-

rance of the land, the action lieth, per 32 Ed. 3. Account 59. Fitz. 27.

B (a) And if a man during the minority of the heir enter
into the land of the heir which he hath by descent, and
take the profits to the use of the heir, the heir at full age
shall have an account against him as guardian for the pro-
fits received until he came to the age of fourteen years;
and for the profits received after the heir came of the age
of fourteen years, he shall have a writ of account against
him as bailiff, and not as guardian; for he cannot be
guardian longer for socage lands than till fourteen years
of age: but the heir shall not have an action of account
against him as guardian, until the heir be of the full age
of twenty-one years, and that by the words of the statute,
which are *qui cum ad ætatem pervenerit, &c.* But he shall
have an action of account against him as bailiff during his

V. Old N. B. 9.
and after 149.
B. for admea-
surement of dow-
er by infant.
16 Ed. 2.
Account 30.
3 & 4 Mar.
Dyer 137.

6 Ed. 3. pl. 12.
a case contra.

(a) If one enters and claims the
land as guardian in chivalry, where
the land is held in socage, he shall
be only bailiff to the infant, 28 Aff.
13. 34 Aff. 10. and the heir may
have account against him as guardian
in socage. 10 H. 6. 7. per Cott.
41 Ed. 3. Account 35. 32 Ed. 3.
Account 59. And note; the account
of guardian in socage is only for the
issues of the land, for if he receive
other monies, he shall be charged as
receiver. 32 Ed. 3. Account 60.

Note; The power of a guardian in
socage is gone by the taking of a hus-
band by the infant, and yet they shall
have account against the guardian,
if he continues after. 10 R. 2. Ac-
count 132. See Lit. 27. contra 4 Ed.
3. Account 107. 12 H. 7. 26. 16
Ed. 2. Account 20. 29 Ed. 3. 5.
contra. See also 33 H. 6. 2. 2 H.
4. 12. That it lies not against a
disseisor.

If a feme guardian in socage takes
husband, account lies against both;
and note; the age there was tried by
inspection; *quære* 18 Ed. 3. 55. it
lies till the full age of the heir, ex-
cept the custom enables the infant at
fifteen, and therefore they were at
issue on the age. 29 Ed. 3. 5. See
18 Ed. 2. Account 120. See a feme
guardian in socage took husband, ac-
count lies against the baron sole, for
the profit taken after the coverture,
but for those before, against both.
8 Ed. 2. Brief 847. See 2 H. 4. 12.
a. per Hankf. a man distrains, &c.
in his own name, and after makes
conusance as bailiff, he shall not have
aid of the lord. 7 H. 4. 34. If one
receives rent from my tenants with-
out my assent, account lies, & *n'un-*
que receiver shall not aid him. 4 H.
7. Brief 65. Vid. 117. n. e.

nonage, at what time he will against him who taketh the profits of the land which he hath by descent, be he guardian in socage in right, &c. or not.

And a writ appeareth in the Register, that if a man be found in arrearages upon his account, and the party plaintiff (b) arrest him in *London* for those arrearages, then he may sue a writ in chancery directed unto the sheriff, rehearsing the whole matter, commanding the sheriff to detain and keep in prison him who is so arrested, until he hath satisfied and paid the arrearages. And it seemeth by the same reason, that if a man sue an action of debt upon arrearages of account before auditors, and the party be arrested, that he shall have a writ out of the chancery unto the sheriff, to keep him in prison until he hath paid those arrearages; but I conceive this writ doth not stand in law, that he shall be kept in prison without answering unto the suit commenced against him.

19 H. 6. 4.

14 H. 6. 4.

16 Ed. 3.

Account 52.

contr. 19 H. 6.

5. 3 E. 4. 40.

15 E. 4. 16.

13 H. 4. 8.

1 H. 5. 2. contr.

2 H. 5. 2.

47 Ed. 3. 16.

4 Ed. 3. ac.

A man may have a writ of account against a woman D as *receptrix denariorum*, or against a chaplain, but not against an infant (a).

A man may have an account against one as bailiff of a E court or hundred (b).

(c) And a man shall have an account against a prior F upon a receipt had by his commoign, but there the writ

(b) Note; If the defendant pleads in bar, and it is found against him, he shall be awarded to the *Fleet*, *instantly*, 39 Ed. 3. 35. but if the plaintiff there leaves him without accounting, he may have a *scire facias* against the plaintiff; and if the plaintiff does not come at the day, the defendant shall be dismissed, and thereby the plaintiff has lost the advantage of the judgment; and *per Ansham*, of the writ also. 18 Ed. 2. Account 123. See 1 H. 7. 1. But if he will not account, the plaintiff may pray judgment according to the account. 14 Ed. 3. Account 109.

(a) In account, it is a good plea to say he was under age at the time of the receipt. 21 Ed. 3. 7. See the form of the writ against baron and feme, on a receipt by the feme. *Dyer* 202.

(b) Or of a nief. 2 H. 5. 2. 47 Ed. 3. 16.

(c) The count shall not abate, but when it supposes a receipt by the hands of the commonk, or feme of the plaintiff, or defendant; but it shall not oust the defendant of his law. But it seems the count is good, supposing the receipt immediate in such case. 13 H. 4. 8. 2 H. 5. 2. 10 Ed. 4. 6. 15 Ed. 4. 16. See 4 Ed. 3. pl. 45. 5 Ed. 3. pl. 6. contra.

suppo-

supposeth that he himself did receive the money, &c. and shall not say, by the hands of his commoign. And so a receipt made by the husband, by the hands of his wife, is his own receipt, and the writ and the count shall suppose that he himself did receive, &c. without saying by the hands of the wife; but it is otherwise if a prior or husband receive money of a stranger, then the count shall be that he received by the hands of a stranger, &c. But the writ shall be general, *tempore quo fuit receptor denar* without saying by whose hands, but he shall shew that in the count or declaration.

44 Ed. 1. but
5 Ed. 3. 21.
Account 100.
contra.

G And if a man deliver goods or money beyond sea to deliver to him again in *England* at a certain place, he shall have an account for those goods, &c.

41 Ed. 3. 9. 12.

And if a man deliver money to one upon condition, that if he do such a thing, he shall have the money, if not, then he who delivered it shall have it again; if he perform not the condition, he shall have an account against him for the same.

41 Ed. 3. 10.
12 H. 4. 18.
ac. 11 H. 4.
75. Skreen.
21 Ed. 3.
Account 66.

H (d) If two have goods in jointure, or in common, and one of them deliver the goods to the other to render account, he alone shall have an action for them (e).

I If two have a ward, and one take all the profits, the other shall have an account against him (f). P.

43 Ed. 2. 21.
45 Ed. 3. 20.

45 Ed. 3.

(d) See *contra* 13 Ed. 2. Account 158. 15 Ed. 2. Account 119. 31 Ed. 1. Account 126. where one jointenant alone was bailiff.

(e) 12 H. 4. 18. per Trem.

(f) *Viz.* Where he was his bailiff. 21 Ed. 3. 60. Account 66. 14 Ed. 3. Account 70. 30 Ed. 1. Account 127. 31 Ed. 1. Account 126. And see there a summons and severance in account. See 17 Ed. 2. Account 122. 47 Ed. 3. 22. 49 Ed. 3. 28.

Note; In account by C. against B. as receiver by the hands of D. the defendant pleads that A. made the

plaintiff and defendant his executors, and that D. was indebted to A. in such a sum, and that the defendant received it. *Resolved*, 1. That account does not lie by one executor against the other, for the possession of the one is the possession of the other. 2. That it is no plea here, if he does not say that he received the money to render an account, &c. for one piece of money cannot be known from another; but it is otherwise in trespass or detinue of chattels which may be known. 11 H. 4. 79. 13 H. 4. 1.

10 H. 6. 11.
Bennet v. Davis,
2 P. Wms. 316.

(a) If the husband have received the profits of the wife's lands, and die, the wife shall not have a writ of account of the profits nor of the rents, during the coverture, against the husband's executors. **A**

4 Ed. 3. 17.
Fitz. Account
97.

(b) If a receiver or bailiff make a deputy, yet the action of account shall be brought against the receiver or bailiff themselves, and not against their deputies; for the deputies receive the same to their master's use. **B**

11 R. 2.
Account 48.
4 Ed. 3.
Account 34.

He who is surveyor of lands or comptroller, shall not be charged in account (c). **C**

12 Ed. 3. *ibid.* 75. & 13 Ed. 3. *ibid.* 76.

6 Ed. 3. 3.
Account 102.
8 Ed. 3.
Account 94.
V. Account as
receiver, the de-
fendant said that
he was his apprentice,
and no plea, but he was forced to answer to the receipt.

An apprentice shall not be charged to account by a writ of account; but the master shall have a writ of account against a servant who is sent to receive money, &c. if he be receiver (d). **D**

6 Ed. 6. p. 7.

(e) The parish priest shall not be charged for the offerings offered, by a writ of account, if it be not otherwise agreed betwixt them, &c. for the clerk holds the vessel in which they are put. **E**

Supra 114. C.

If the king grant unto a town the toll of the things sold in the same town, for the walling of the town, and other necessary things in the town, and there be collectors to receive the same, if the collectors will not render account thereof, they may have a commission out of the chancery to inquire of the receipt of the toll-money, and the re- **F**

(a) See 11 R. 2. Account 49. For rent issuing out of a freehold, by one during the coverture, the feme shall have account, and not the husband's executors; *contra* of other rescuits.

(b) And the immediate bailiff shall have account against his deputy. Note; He surmised that he had accounted. See 4 Ed. 3. 17. & 8. 11 R. 2. Account—.

(c) See 41 Ed. 3. Account 34. 11 Ed. 3. *ib.* 75. 13 Ed. 3. *ibid.* 76. 12 Ed. 3. 13 Ed. 3.

(d) If they are not in a bag sealed. 29 Ed. 3. 20. 8 Ed. 3. 261. *Vide* 117. note d.

(e) 25 Ed. 3. 46. But if he was his procurator of the church, to receive to his use the offerings, &c. Account lies from the time that he was *Bailivus Eccl'*. 30 Ed. 3. 1. 25 Ed. 3. 46.

ceivers,

ceivers, and to hear and determine the same, and to audit their accounts, and a writ of attendance unto the sheriff, to return a jury before the commissioners.

Writ of Debt.

G. **A** Writ of debt properly lieth where a man oweth another a certain sum of money by obligation, or by bargain for a thing sold, or by contract, or upon a loan made by the creditor to the debtor, and the debtor will not pay the debt at the day appointed that he ought to pay it, then (a) the creditor shall have an action of debt against him for the same; and it may be sued in the county before the sheriff by *justicies*, as well as in the common pleas; and the form of the writ is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only, and not in the *debet*, and if it be (b) in the *debet* it shall abate. It shall be always in the *debet* and *detinet*, when he who makes the bargain or contract, or lends the money, or he to whom the bond is made, bringeth the action against him who is bounden, or party to the contract (c)

C. 5. par 79.
10 H. 6. 7.
Debt per amercement in Leet.
22 H. 6. 56.
13 H. 7. 3. in debt against successor upon account to his predecessor, which comes to the use of the house, the writ shall be in the *debet*.

(a) See debt and detinue of things brought against executors, by several *præcipes* in one writ. 11 H. 6. 48. 12 H. 6. 1.

(b) Note; If lessee for years rendering rent makes his executors and dies, debt lies against them in the *detinet*, 10 H. 7. 5. or it may be in the *debet* and *detinet*, 11 H. 6. 16. but by *Hargraves's* case, it shall be in the *debet* only. 5 Co. It is good either way for the occupation, 14 H. 4. 29. but if lessee for years of a rent dies, for rent incurred after his death; it lies in the *detinet*. 11 H. 6. 36.

See 14 H. 4. 28. It is said by *Fort.* that an executor may waive a lease for years made to the testator, rendering rent. See 11 H. 6. 36. It is said, if a termor makes his executors, and dies, and one of the executors occu-

pies the term, that debt lies against him alone in the *debet* and *detinet*. *Vide post.* M.

See 19 H. 8. 8. 10 H. 7. 5. 22 Ed. 4. 21. 41 Ed. 3. Brief 54. 47 Ed. 3. 27.

That a writ of debt lies for a fine to the king, *vide ant.* 96.

Though *W. 2. cap. 11.* gives an action against the gaoler that lets out of prison one committed to him for arrearages of account, yet if one be committed to him upon condemnation in debt, and he lets him go at large, he shall have an action of debt against him, though the statute be penal. *Plowd.* 178. a.

(c) See 50 Ed. 3. 16. 11 H. 7. 6. *Vide infra* M. 19 H. 8. 10 H. 7. 8. 22 Ed. 4. 21.

In debt against husband and wife for a debt before coverture the writ shall be debt and detinet; so in debt against or for the successors in respect of obligation

made to the predecessor. 47 Ed. 3. 23. 40 Ed. 3. 16. 9 Ed. 4. 41. 47 Ed. 3. 23. If the heir be to bring debt, it shall be in the detinet. *Infra* 121. B.

or bargain, or unto the lending of the money; and when the action is brought for the money, and that is demanded by the writ. But if a man sell twenty quarters of wheat, or a horse; if he bring debt for the horse, the writ shall be in the *detinet* only, and the form of the writ sued in the county before the sheriff for money, is such:

(d) *The king to the sheriff of Surry, greeting: We command you, that you justice A. that justly and without delay he render to B. twenty shillings which he oweth to him as it is said, as he can reasonably shew that he ought to render it to him, that we may hear no more clamour for want of justice, &c. Witnesses, &c.*

Ant. 70.

And if the writ of debt be for other goods or chattels than money, then the writ of debt shall be such:

The king to the sheriff, &c. We command you, that you justice A. &c. that he render to B. a certain book, or a certain cup, or a certain horse, or two lambs of the price of, &c. which he unjustly detains from him, &c.

Supra 70. A.

And if a writ of debt be brought in the county before the sheriff by *justices*, the plaintiff may remove the plea unto the common pleas by a *pone*, without shewing cause in the writ: but the defendant shall not remove the plea out of the county without shewing cause in the *pone*, and yet in the end of the writ it shall be said, *Let execution of this writ be done, if the cause be true, otherwise not.* And the causes wherefore the defendant may remove the plea, are many, as appeareth in the Register. One, if the defendant plead a foreign plea, which cannot be tried in the county, &c. Or if the defendant shew that he, before whom the plea is depending, doth maintain the plaintiff, or favour him, &c.

(d) *Note*; On a *justices*, the sheriff cannot award a *capias* or a *ca. sa.* as it seems nor if the suit be removed by *pone* into C. B. and the sheriff return *nil habet*, the court cannot grant a *capias*; but it is otherwise on a *replevin* removed, *ut supra*. 3 H. 6. 54. Stat. 25 Ed. 3. cap. 17.

And if the plea of debt be sued within any liberty, or court of any borough or city, &c. the plaintiff may remove the plea by a *recordari* into the common pleas without shewing any cause in the writ. But if the defendant sue to remove the plea by a *recordari* into the common pleas, out of any town or city, he ought to shew cause in the writ, as before is said. And if the sheriff remove the plea out of the court by a *pone* at the suit of the defendant or plaintiff; and afterwards the bailiffs or officers of the court proceed in the plea, and give judgment, and do execution, &c. then the defendant, or he against whom the judgment is given and execution done, shall have an attachment against the bailiffs, or those who so proceeded to judgment, &c. to answer as well the king for the contempt, as the party his damages, &c. And the form of the writ of debt in the common pleas is,

Supra 70. b.
Infra 125.
F. 128. A.

L *The king to the sheriff, &c. Command A. that justly, &c. he render to B. one hundred shillings, which he owes to him, and unjustly detains; as it is said; and unless he will do it, and the aforesaid B. shall make you secure, &c. then summon by good summoners the aforesaid A. &c.*

M (a) And the rule in the Register is, *That in a writ of debt of chattels, it is never said, "That he oweth to him."* And if the debt be brought by executors for a duty due to their testator, the writ shall be, *Which he detains from them,*

29 H. 8. 8.
Vide supra, H.
&c. ib.

(a) *Note*; The judgment is for the chattels or the value, and so conditional. See 50 Ed. 3. 16. 9 Ed. 4. 49. *Raft. Entr.* 174. *Co. Lit.* 90.

If judgment be given either for or against executors in debt for a duty due by the testator, the writ brought on such judgment shall be only *detinet*. 11 H. 6. 56. adjudged. 10 H. 7. 5. 11 H. 6. 36. So if the executors assign auditors to the testator's accountant, debt on the account shall be in the *detinet* only. 10 H. 7. 61. 11 H. 6. 17. 20 H. 6. 4. See 2 H. 4. 13. *Note* the reason of those cases, where the foundation of the action appears of necessity to commence in

the testator, the writ shall be in the *detinet, ut supra*: So if they (the executors) bring debt on a judgment given in trespass brought by them of goods taken out of the possession of their testator; *contra* if it was *de bonis testatoris extra custodiam sua*; per Park.

But if they take an obligation for a contract made to the testator, or if they sell goods of the testator, it shall be *debet* and *detinet*, because the commencement of the action was in the executors. 20 H. 6. 415. b. That it shall be in the *detinet* adjudged. See 17 Ed. 3. *Brief* 87.

and not owes to and detains, because they were not parties to the contract. And so if debt be brought by the creditor against executors for the debt of the testator, the writ shall be, *Which they detain from him*, and not owe and detain, although by the writ he demand money, viz. twenty pounds, or other sum of money.

[120]

If a man make *B.* and a monk his executors, and is indebted unto another, the action of debt shall be brought against *B.* and the abbot and the monk; and the form of the writ shall be such:

Command B. executor of the testament of S. and the abbot of C. and friar A. of C. co-canon of the same abbot of C. co-executor of the said testament of the aforesaid B. &c. twenty pounds. And if they bring an action the writ shall be: Command D. &c. that he render to B. executor of the testament of S. and to the abbot of C. friar A. of C. co-canon of the same abbot of C. co-executor of the said testament of the aforesaid B.

Joinder in action
75 H. 7. 8. Keb.
A lease for years
to a secular man
and an abbot;
quære how they
hold. See
15 Eliz. Plow.
441. The heir
of the heir shall
be charged,

And if a man be bound unto *B.* and an abbot in twenty pounds, and *B.* dieth, his executors and the abbot shall join in the action of debt, and the writ shall be such:
Lit. 61.

Command C. &c. that justly, &c. he render to B. and M. executors of the testament of R. and to the abbot of C. ten pounds, &c. which, &c. and unless, &c. and the aforesaid executors and abbot shall make you secure, &c.

And if a writ of debt be brought against the heir upon an obligation of his ancestor, the writ shall be such:
Command A. of S. son and heir of B. that he render, &c. (a).

(b) And if there be divers heirs, then the writ shall be,
Command A. of S. brother and one of the heirs of B. and B. cousin and the other heir of the same B. &c.

(a) See a petition in parliament against charging the heir in such a case. *Parl. 25 Ed. 3. No. 35. Note;* the words *fil' & hæred'* were omitted, yet held good, 10 *Ed. 3. 15.* yet it is otherwise, if the writ be *filio & hæredi apparenti*, and he counts against him as son and heir generally. *Pas. 35 Eliz. Rot. 242. Newdigate's case, 32 Ed. 3. Brief 289.* and it shall be in the debt. *Ibidem 294.*
(b) See 11 *H. 7. 12. 11 Ed. 3. Debt 7. 10 Ed. 3. 63. 7 Eliz. 277.*

D And if a man be in debt, and die intestate, or the executors refuse to be executors, for which the goods come to the hands of the ordinary, the creditors shall have an action of debt against the ordinary by the statute of *West.* 2. cap. 19. and the writ shall be such:

(c) *Command A. bishop of Lincoln, to whose hand came the goods and chattels which were B.'s who died intestate, as it is said, that justly, &c. he render, &c.*

And if the goods come unto the hands of the ordinary, and afterwards the ordinary make executors, and die, the creditor shall have an action of debt against the executors of the ordinary, and the writ shall be such:

Command A. of B. and C. of T. executors of the testament of master R. of P. late dean of the church of blessed Peter of York, and guardian of the spirituality of the archbishoprick of York, the see being vacant, to whose hands came the goods and chattels which were E.'s of B. who died intestate, as it is said, that justly, &c. they render, &c. (a)

And it appeareth by the Register, that in anno 16 *Ed.* 3. the plaintiff was (b) answered unto such writ which he brought against the executors of the ordinary.

(c) See 11 *H.* 4. 71. per *Hankf.* without counting that he is ordinary of the place. See 17 *Ed.* 2. *Brief* 822. that it does not lie at common law. *Dyer* 297. *Vide contr.* and note; where it is against the bishop only for the goods which he administered within his diocese, adjudged otherwise, and note; if the ordinary administers 100*l.* and afterwards commits administration, he is yet liable. 12 *R.* 2. *Administration* 21.

See 17 *Ed.* 2. *Brief* 822. the writ was brought against the dean himself as guardian, &c. and they were at issue thereon. See 11 *Ed.* 3. *Executor* 77. where a writ was brought against the executors of a dean. *Ald.* doubted. For by him here the executors are to be charged, for that the goods of the intestate came to the hands of the ordinary, and yet it seems

they are not chargeable as executors of the ordinary, no more than the executors of an administrator. See *Brudenell's case*, 5 *Co.* 9.

Note; The stat. of *West.* 2. cap. 21. 31 *Ed.* 3. 11. Administrators and the ordinary charged in the same manner, viz. as executors. See 24 *Ed.* 3. 54. *Rot. Parl.* 9 *Ed.* 2. *M.* 5. *Dyer* 271.

(a) *Quod juste, &c.* Note; this clause is where the executors refuse. *Reg.* 141. *Dyer* 236. 6 *Eliz.* 280. a. 11 *Ed.* 3. *Bro. Executors* 161. *Fitz.* 77. 17 *Ed.* 2. *Brief* 822.

(b) Note; This writ here is mistaken, for the writ which he speaks of is brought against the deacon himself, 16 *Ed.* 2. and not against his executors. 16 *Ed.* 3. See 11 *Ed.* 3. *Executors* 77.

14 H. 4. 30.
So against guar-
dian of the spi-
ritualties.

And there is a writ of debt in the Register for the ordinary, against him who was indebted to him who died intestate. But the opinion of the sages of the law at this day is, that the (c) ordinary shall not have an action of debt against those who were indebted to the intestate, because the action is given to the administrator, and the ordinary may commit administration of the goods (d)

(c) See 7 H. 4. 18. 18 H. 6. 23. accordant. And therefore, if A. be indebted to B. and B. to C. and B. dies intestate, C. cannot attach the debt of B. in the hands of the ordinary by the custom of London. *Dyer* 247. *Quere Kelw.* 127. if he can release the debt. See 16 Ed. *Executors* 77. per *Tr.*

(d) Even by *Parol*; *Quere* 9 H. 5. 5. he may repeal it, and therefore the committing the administration transfers the power from the ordinary to the administrator, and therefore the administrator shall have trespass for a trespass done to the goods, or debt for rent arrear, before the administration committed, and after the death of the testator, for the law adjudges him administrator *ab initio*. 18 H. 6. 23.

Note; No account lay for an administrator at common law. 19 Ed. 3. *Administrator* 20. Also at common law, before the stat. 31 Ed. 3. cap. 11. the ordinary might commit administration, and therefore he shall be discharged for doing it, *Plo.* 280. and debt was maintainable against them, but not by the name of administrators, but as executors, 38 Ed. 3. 21. and the action is given against them as administrators, by the statute 31 Ed. 3. &c. and so agreed *per omnes*. 11 H. 4. 73. and *Lib. Intr.*— And therefore the action against them is founded on the statute as well as the action for them, and therefore he that administers *de son tort*, shall not be

called administrator, but executor. 35 H. 6. 31. per *Moile*.

The form of the count is, *cui administratio, &c. per I. S. official' loci illius ordinari. apud S. post mort' prædict' G. commissa fuit*; so that it is necessary for the plaintiff to shew that the defendant was made administrator by the ordinary in his count, else it is not good. 44 Ed. 3. 16. per *cur.* 11 H. 4. 73. per *Thorn. Hill* and *Culp. contra Hankf.* See *contra* 9 H. 5. 7. for it is there said, that it shall be intended to be committed by the ordinary; and for that it may be so intended, you need not count on a commission by the ordinary in an action against them, 35 H. 6. 46. (See *T. Jon.*) also the ordinary's right might thereby be drawn in question, 37 H. 6. 27. and therefore in this case it is no plea to say *n'unique administrator, ne unique administrator come administrator*; but only that administration was not committed to him, 35 H. 6. 38. 9 H. 5. 7. 11 H. 4. 73. per *Hil.* and if the defendant pleads that administration was committed to him, and I. S. not named, to which he agreed, the other shall not say that I. S. never administered, without traversing the commission of the administration, or the agreement; but it is otherwise, if such agreement be not surmised; for there *per cur.* it is a good issue that I. S. never administered. 8 H. 6. 2. 9 H. 6. 6. 20 H. 6. 1.

when

when he pleaseth. But before the statute of 31 *Ed.* 3. cap. 11. the administrators could not have an action of debt against the debtors, wherefore it was then thought reason, that some person should have the action for those debts, &c. But the ordinary at this day may have an action of trespass for taking of the goods out of his own possession, but not for taking them out of his possession who died intestate, as administrators may have.

Supra 92. M.

E If a man be retained in *England* to do service beyond sea, receiving ten pounds *per annum*, he shall have an action of debt in *England* where the retainer was.

F If a man marries a woman who is in debt to divers persons, the husband and wife shall be sued for the debts, living the wife: but if the wife die, the husband shall not be charged for the debt after the death of the wife, if the creditor of the husband and wife do not recover the debt during the coverture, which was due by the wife before the coverture: but then, although the wife die, yet the husband shall be charged for that debt by that recovery after the death of the wife.

48 *Ed.* 3. 1.
49 *Ed.* 3. 25.
20 *H.* 6. 11.
22.
8 *Ed.* 4. 11.
F. Dett 168.

G (a) A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority unto his bailiff or servant to buy and sell for him: and so for the contract of the wife, if he give such authority to his wife, otherwise not.

2 *R.* 3. *Fitz.*
Dett 3.

H If a man lease lands for years rendring rent (b), and for default of payment, that he shall re-enter; if he do re-enter in the land for non-payment of the rent, yet he may have an action of debt for the rent, for which he doth re-enter, and in the writ shall recover the rent, for which he re-entered,

17 *Ed.* 3. 48.
18 *Ed.* 3.
Debt 6.
36 *Ed.* 3. 7.
Debt 10.

(a) But if the bailiff in that case makes a contract without any special authority, and it comes to his own use, *Quære* 2 *H.* 3. *Debt* 8. 34 *Ed.* 1. *Debt* 6. 163. 13 *H.* 4. *Debt* 179. 21 *H.* 7. 4. See a diversity between an agreement for goods and the coming of them to the use of the mailer. See 27 *H.* 8. 25.

(b) So if he makes a lease for life rendering rent, and surrenders, &c. 17 *Ed.* 3. 48. 73. 18 *Ed.* 3. 10. 30 *Ed.* 3. 7. 38 *Ed.* 3. 10. contr. by some, 19 *H.* 6. 42. for the re-entry is not a penalty, so of a *nomine pœnæ*. See 38 *Ed.* 3. 22. 18 *Ed.* 3. 9. 19 *H.* 6. 42. 6 *H.* 7. 3.

(c) If

14 Ed. 3.

Debt 135.

A man was

bound to one and

his heirs, and

holden the heir

should not have

debt living the

executors.

9 H. 6. 58. The heir shall not have detinue for a deed bailed by his father. 19 H. 6. 4. 48 Ed.

3. 12. It is said, that if the ordinary do not commit administration, the heir shall have debt.

(c) If a man bind himself and his heirs unto another in twenty pounds and die, the heir shall be charged to pay the same, if he have lands by descent in fee-simple from his ancestors, otherwise not. But if a man be bounden in an obligation to one and his heirs, and the obligee die,

(c) See a special judgment against the heir on a *nil dicit*, *Dyer* 344. when against the executors of the heir; so if the eldest son enters after the death of the father, and dies, debt lies against the younger son, as heir to the father. *Dyer* 363. *Note*; *A.* seised of one acre at common law, and three acres in gavelkind, obliges himself and his heirs by bond to *B.* and dies, having three sons *C.* *D.* and *E.* *E.* aliens his purparty, *B.* brings debt against *C.* and *D.* and pending the writ, *E.* repurchases. 1. If the elder had not assets at common law, it seems of necessity, that the writ ought to be against all of them, 11 H. 7. 12. 38 H. 6. 22. and so of a vouchee, for they are *in eodem gradu*. 2. If the elder took by descent at common law, it seems that he shall be charged sole; *Quære*, for thereby his purparty in gavelkind should be also liable, and therefore adjudged, 11 Ed. 3. *Dett* 27. *contr.* but where he has assets at common law, see 38 Ed. 3. 22. 3. It seems there may be one action against them, and several counts, *viz.* against *E.* as heir general, and against *C.* and *D.* as heirs by gavelkind, for if he does not count severally, he shall not have execution but of the lands in gavelkind. *Quære* 11 Ed. 3. *Dett* 7. and so in case of voucher. 4 Ed. 3. 55. *per Will.* 4. The writ ought to be against *C.* *D.* and *E.* though *E.* has nothing, but if *C.* had assets at common law, and *D.* and *E.* nothing, it should be brought against *C.* alone,

but if the writ had been against all, seeing *E.* had nothing, the whole should be levied on the others. 11 Ed. 3. 7. 6 Ed. 3. 50. 5. Although the heir aliens, and repurchases before, or pending the writ, he is yet liable. 26 H. 8. 1. 27 Ed. 3. 82. 10 Ed. 3. 15. adjudged. See 19 H. 6. 46. 48 Ed. 3. 32. 40 Ed. 3. 10. 6. If the writ were brought against the elder son only, and pending that the land in gavelkind had descended to him and the other, the writ should abate; *per Shard.* 11 Ed. 3. *Debt* 7. See 11 H. 7. 12. If *A.* seised of lands on the part of his father, bind himself, and dies without issue, several actions may be brought against the several heirs, but only one execution. *Quære*, and *note*, It seems that by the repurchase, he shall abate the writ against the elder one. *Dyer* 230. and 204. Debt was against three heirs in gavelkind; they were outlawed, and two purchase a charter of pardon, they shall not plead nonage of the third, because he is out of court, but must answer alone. *Dyer* 224. See where the heir shall have debt on an obligation to his ancestor. 49 Aff. 4. See debt by the heir on an obligation made to his father and his heirs, the defendant pleads a release by the father's executors, but was forced to answer to the deed of his father. 14 Ed. 3. (See 19 H. 6. 41. a difference between *debt* and *detinue* by the heir.) See 14 Ed. 3. *Dett* 135. 139, 140.

his

his heir shall not have an action of debt upon the obligation, but his executors. *Post.* 122. G.

K (a) If a man promise to one twenty pounds to marry his daughter, and he marry her, he shall have an action of debt against him upon that promise. *H.* 31 *Ed.* 3.

L (b) If a parson have an annuity in fee in the right of his church, and the annuity be behind, and the parson die, his executors shall have debt for the arrearages of the annuity in the life of the testator.

M If a man grant to one a rent in fee, and further grant, that if the rent be behind, &c. that he shall forfeit for a penalty forty shillings to the grantee and his heirs, if the rent be arrear, the grantee shall have debt for the penalty. And so the heir shall have the penalty, and shall have debt for the same, because it is an inheritance, and perhaps may continue, &c.

A If a man be condemned in debt or damages, and be committed unto prison for the same; if the gaoler suffer him to go at liberty, or he escape out of prison (a), the gaoler

19 H. 4.
Debt 166.
45 Ed. 3. 24.
ac. if it be by
deed.
15 Ed. 4. 32.
cont. per cur.
37 H. 6. 8.
ac. 21 H. 7. 5.
7 H. 6. 19.
11 H. 5. 95.
Thirning and
Skreen, that he
may distrain for
the penalty, quod
non est lex.
But note, that
if a man be in
prison by a *capias*
ad computand.
and after escape,
no debt, but ac-
tion upon the
case, because he
is not in prison
for any duty, by
Choke and
Pigot.
15 Ed. 4. 19.
16 Ed. 4. 2 and 3.

(a) If a promise be to pay one forty pounds for service done, debt lies, and he shall count *unde devenit obligat.* in such a sum. 29 *Ed.* 3. 25. So if one promise to another twenty pounds if he will marry his daughter, debt lies without any specialty. 31 *Ed.* 3. *Dett* 8. 34 *Ed.* 1. *Debt* 159. 1 *R.* 2. *Debt* 166. See 45 *Ed.* 3. 24. 29 *Ed.* 3. 33. *Ant.* 44. O. but 14 *Ed.* 4. 6. *contra.*

(b) Debt by the executors of a parson for arrears of an annuity, which his predecessor had by prescription, 12 *H.* 6. 8. so a successor shall be charged with the arrears of an annuity incurred in the life of his predecessor, 21 *H.* 7. 5. yet the successor of *St. Cross* could not recover damages for arrears of annuity in time of his predecessor, but only for arrears

in his own time; nor could a parson who was presentative, and not elective. 20 *Aff.* 4.

(a) *Note*; Though the gaoler retakes him, if it be after the writ, it is no excuse. 31 *Ed.* 1. *Debt* 162. *Note*; on the escape, against the sheriff it is a new debt; and therefore, if the mayor of the staple suffers one to go at large, who is in prison for debt for merchandise, and a new mayor is, debt lies against him, not on the statute-staple, but at common law: so by *Paston*, a release made to him who escapes is no plea in debt against the sheriff. 9 *H.* 6. 19. Debt on escape does not lie against an heir or executor of a gaoler. *Dyer* 271. 322. 41 *Aff.* 15. In debt by the conusee of a statute-staple, *Note* 13 *Ed.* 3. *Barr.* 253. Debt lies by the

gaoler shall be chargeable in debt to him at whose suit he was imprisoned, and his executors (b).

30 Ed. 3. 16.

If a man lend another man a horse until a certain day, B and then he to re-deliver the horse or ten pounds at the same day, after the day if the horse be not delivered, it is in his election to bring an action of debt for the horse in the *detinet*, or an action of debt for the ten pounds in the *debet* (c).

Supra 119. H.

26 Ed. 3. 64.

Debt 180.

10 H. 6. 11.

9 H. 6. 29.

20 H. 6. 45.

Ascough.

49 Ed. 3. 25.

Supra 120. F.

(d) If a man make a lease for life unto a woman, rendering rent, if she marry, and after the rent be behind, and the wife die, the husband shall be charged in an action of debt for the rent behind, because he took the profits of the lands by reason of his wife; otherwise it is of an obligation made by his wife before marriage, then the husband shall not be charged if a recovery be not against him and his wife in the life of the wife (e).

the abbot of *W.* for suffering *A.* to go at large, who was delivered to the gaoler by auditors for arrears of account; and it is agreed, 1. That if *A.* escapes, and after sues an *ex parte talis*, yet pending that, debt lies against the gaoler. 2. If the defendant let him go at large by the command of the abbot, though it be without deed, yet he is discharged; for the abbot was sovereign gaoler, and the other but his deputy; *aliter*, if it had not been so. See 10 H. 7. 3. 27 H. 8. 24. *Cawdry's case*. If three are imprisoned, and one only escape, debt lies against the sheriff, if it be on a joint condemnation. 20 H. 7. *Kekew. 68.*

(b) See 7 H. 6. 5. and debt against a sheriff, 11 Ed. 2. *Debt 172.* 13 H. 7. 2. 34 Ed. 1. *Debt 162.* Stat. 1 R. 2. and *Westm. 2.* and *infra P.*

(c) See 13 Ed. 4. 4. 9 Ed. 4. 37. 49. 26 Ed. 3. 71.

(d) Note Sir *W. Levings's case*, 26 Ed. 3. 64. *A.* grants a rent to

B. for life out of the manor of *C.* and afterwards enfeoffs *D.* of the manor who takes *G.* to husband, and then *B.* dies, and his executors bring debt against *G.* and adjudged, 1. That for all arrears incurred after the coverture, debt lies against the husband; or if he were dead, against his executors; but, 2. For all arrears incurred before the coverture, the action shall be brought against the husband and wife. See 10 H. 6. 11, 12. accordant.

(e) See 10 H. 6. 10. *per Babb.* and Note 12 R. 2. *Account 49.* *A.* lessee for the life of a feme covert rendering rent, *B.* receives the rent as receiver, the husband dies, the wife shall have account against *B.* and not against the executors of the husband; *aliter* as it seemed to *Babb.* &c. if the receipt had been of a personal duty.

See 1 Lev. 25. 4 Co. 89. 10 H. 7. 11. 6 Ed. 2. *Execution 109.* 10 H. 6. 12. 49 Ed. 3. 25. 39 H. 6. 22.

If a woman be endowed of a rent, and afterwards take husband, and the rent be arrear, and the wife die, the husband shall have an action of debt for the rent, because it was a duty in him during the marriage. But if a man be bounden unto a woman, and she take husband, and the day of payment come during marriage, and after the wife die, the husband shall not have an action of debt upon the bond, because it was a duty due unto the wife and a thing in action before the marriage (a).

V. 14 H. 6. 26.
10 H. 6. 11.
4 Co. 89.

D (b) If a parson have an annuity in fee, and the same be behind, and the parson resign, yet he shall have an action of debt for the arrearages before the resignation.

19 H. 6. 14.
Quære, Aſcut
pro' Newton
con'.

E And if a man lease a manor for life, and the rent be behind, which the tenants who hold of the manor are to pay, and the lessee for life of the manor die, his executors shall have debt for the arrearages of the rent due by the tenants of the manor.

(c) And so if the tenant for life of the manor, surrender his estate to him in the reversion of the manor, yet he shall have debt against the tenants of the manor for the arrearages before.

F (d) If a man have a patent from the king to have a certain sum for term of years, or for life, out of the customs of London, and thereupon he have a *liberate* to the customer to pay him, which he delivereth to the customer, at which time the customer hath enough in his hands to pay him; now by the delivery of the *liberate*, and the assents in the hands of the customer, the customer is debtor unto him, and he shall upon this matter have debt against him.

37 H. 6. 25.
If a liberate be
delivered to cus-
tomers or other
collectors that
will satisfy, they
shall be discharg-
ed against all
others.
27 H. 6. 9. ac.
21 H. 6.
Debt 43.

(a) And yet it is held, the husband may release it. 15 H. 6. 41.

(b) See accordant 19 H. 6. 42. and so note; the arrears here do not belong to the successor, yet see 19 H. 6. 44. where it is a sole corporation regular, which cannot make an executor, as an abbot, prior, master or warden of an hospital, &c. there the successor shall have the arrears of an

annuity, and so of a corporation aggregate. 19 H. 6. 42. per Aſcut. See 16 Ed. 3. 22. 4 Ed. 3. 9.

(c) See accordant 9 H. 7. 16, 17. yet if it be a lease for years, the lessee cannot have debt during the term.

(d) And so if after delivery of one tally, another is delivered, it lies for that first delivered. 21 H. 6. Debt 43.

(e) If

(e) If two submit themselves to an award, and the arbiters award that one shall pay the other ten pounds, he shall have an action of debt upon that arbitrament. G

37 H. 6. 35.

(f) If an abbot hath an annuity in fee, and the same is behind, he shall not have an action of debt for the arrearages, because the annuity continueth. H

38 H. 6. 5.
7 H. 4. 3.

Neither shall a parson have an action of debt for the arrearages of an annuity, which he hath in fee during the time that he is parson: but if he resign, he shall, or if he die, his executors shall have an action of debt for the same. And if a man who is (a) bailiff account (b) before auditors, and it be found that he hath expended more than he hath received, for the surplufage, he shall have an action of debt against the lord whose bailiff he was. But if a receiver account, and be found in surplufage, many say that he shall not have an action of debt for the same, because he was not bounden to lay out any parcel thereof: but it seemeth if he do it by command of the lord, I

(e) *Note*; In debt on arbitrament, the cause why such sum was awarded, shall not come in debate, but in debt on account before auditors, it may be debated, whether there were such account, or if there were such receipt by the defendant. 20 H. 6. 6. And therefore, if the arrears of a lease for years, or a thing be delivered, for which *detinue* lies, are put in the account, the party shall have his law, if it appears by examination; for notwithstanding such account, he may have debt for the rent, or *detinue* for the goods, 20 H. 6. 16. and therefore in debt on arrears of an account before auditors, it is a good plea, *nullius inquit account, or nil debet modo & forma*, and give in evidence, there was not any such account; for if so, there cannot be any arrears. 20 H. 6. 24.

(f) See 19 H. 6. 42. the case of a designed parson well debated. See 17 Ed. 3. 12. 19 Ed. 2. Debt 176. 10 H. 6. 24. 20 and 28 H. 6.

(a) See 7 H. 4. 3. *Note*; This allowance before auditors is made parcel of the account, and as well of record, and therefore on such surplufage, debt lies against the executors. See 10 H. 6. 25. so adjudged.

(b) Because a bailiff by his office is bound to be at expences, 29 Ed. 3. 20. and so it seems is a receiver to merchandize, &c. and a general receiver retained to travel for his receipts, &c. *Contr.* of a receiver of a certain sum, for he shall have no allowance of such expences as he makes without orders; and *note*, in such action for surplufage by a bailiff or receiver, he shall wage his law. 14 H. 6. 24. 36 H. 6. 6. For the auditors are made judges in advantage of the master, and not of the bailiff; and this was so at common law; *sed contr.* adjudged by all the justices in C. S. 21 H. 6. 16. 19 Ed. 2. Debt. 176.

that then it is reason that he have an action of debt against the lord for the surplufage.

K (c) An abbot shall be charged in an action of debt upon a loan of money made unto his predecessor, if the money came to the use of the house.

L An attorney shall have an action of debt against his client for money which he hath paid unto any person for his client, for costs of suit, or unto his counsel, &c.

M (d) If a man contract to pay money for a thing which he hath bought; if he make a bond for the money, the contract is discharged, and an action of debt will not lie upon the contract.

41 Ed. 3.
Debt 127.
3 Ed. 4. 26.
The writ shall
be general, and
the count special.
20 H. 6. 21.
Newton.
28 H. 6. 4.
39 H. 6. 22. ac.
1 H. 6. 8. per
Babbington.
9 Ed. 4. 20.
and so 10 H. 7.
21 and 24.
22 H. 6. 16.
21 H. 7. 5.
Carter. 3 H. 4. 17.

N (e) If a man make a lease for years, rendering rent, of lands deviseable by will, and afterwards devise the reversion of the same lands unto a stranger in fee, the devisee shall have an action of debt for the rent reserved, without any attornment of the tenant for years. But if the lessor have granted the reversion by fine or deed, the grantee shall not have an action of debt without attornment of the lessee for the rent reserved.

5 H. 7. 18. ac.
so lord by escheat
of a reversion.

O (e) If a man be indebted, and enter into religion, his executors shall be sued for the debt, and not the abbot who accepted him into religion.

4 Ed. 4. 25.
Danby, 5 H. 7.
24. Brion,
13 H. 4.
Debt 167.
5 H. 5. 8.

P (a) If a man be condemned in trespass, or in debt upon a bond, where he denieth his deed, and afterwards he be taken

(c) See 41 Ed. 3. Debt 127. 13 Ed. 4. 4. 22 Ed. 3. 8. 5 H. 7. 25. 39 H. 6. 22. 22 H. 6. 56. (L.) 10 H. 4. Debt 158.

(d) But it is otherwise, if a stranger makes an obligation for the same debt. 35 Ed. 3. Debt 83. See 11 H. 4. 79. 13 H. 4. 1. 10 H. 7. 21.

(e) See 13 H. 4. Debt 167. 467. 4 Ed. 2. Ib. 171. 5 H. 7. 18. 34 H. 6. 6. Lit. 130. (O.) See 5 H. 5. 8. 9 Ed. 2. Debt 171. but

5 H. 7. 20. 4 Ed. 4. 25. 18 Ed. 4. 19. seem contr.

(a) See 14 H. 7. 15. 4 Ed. 4. 16. 36 H. 6. 24. 22 Aff. 73. Note; In debt on obligation, the defendant denies his deed, but found against him; judgment is given, and he taken by *capias pro fine*, and the plaintiff prayed an *elegit*. Stoner said, he should make fine and discharge; but Green contr. 17 Ed. 3. 57. and see a diversity inter debt and trespass, 50 Ed. 3. 4. See 11 H. 7. 15. 13 H. 7. 21. 7 H. 6. 6. 6 Ed.

7 H. 6. 5.
 1 H. 6.
 Debt 26.
 7 H. 4. 4.
 4 Ed. 4. 16.
 22 Ed. 4. 67.
 7 H. 4. 14.
 4 Ed. 4. 16.
 22 Aff. 74.
 21 Ed. 4. 67.
 14 H. 7. 15.
 19, 20.
 21 H. 4. 44.
 Skrene.

taken by a *capias pro fine* at the king's suit within the year, and committed to prison; if the gaoler suffer him to escape, he shall have an action of debt against the gaoler: yet he was not committed to prison at his suit, but at the king's suit. But within the year after the condemnation and judgment, the suit for the king shall serve as well for the party as the king, because the king was intitled to it by the party, but after not: for it shall be intended that the party is agreed with him who is condemned, and therefore after the year he shall be put to his *scire facias* upon the judgment (b).

[122]

9 Ed. 3. 7.
 Debt 149.
 19 H. 6.
 Debt 143.
 Vide 14 H. 8.
 14. for waste.
 7 H. 6. 2.

(c) If a man leaseth lands for term of years, rendering A rent, and afterwards the rent is behind, and the lessee surrendereth his term, yet the lessor shall have an action of debt for the arrearages before, as it seemeth by P. 38 Ed. 3. *tamen quære*, for the opinion is contrary to 2 H. 6.

If a servant will not do his service, by the statute of B 24 Ed. 3. cap. 9. he shall be arrested and committed to the gaol; and if the gaoler set him at large, he shall lose ten pounds to the king, and five pounds to the party. Now if the gaoler set such prisoner at large, the party

6. 6 Ed. 4. 4. 1 H. 7. 10. 20.
 36 H. 6. 33. 7 H. 4. 4. And note, the case here put is Somers's case in debt on an escape, where it was held, that notwithstanding the taking of the party *pro fine*, yet the plaintiff may pray execution by *elegit*; but yet because the party plaintiff shall be satisfied his execution before the king shall be satisfied the fine, he shall be adjudged to be in execution for the party, as well as for the king, so that the sheriff ought not to dismiss him, although the king had pardoned the fine by assent of the party. Also, by the writ against the warden, if he proved by relation, that he elected him to be in execution for him *ab initio*.—*Quære*, if the king pardons him, and yet the sheriff detains him, and afterwards he who recovered, sues

an *elegit*, if the imprisonment after the fine be punishable.

(b) But after the year he may pray that the party be in execution for him; so if he be taken *pro fine* (*ut supra*) in such case action or *capias* does not lie as in assise, redisseisin, &c.

(c) Note; He who surrenders in fact, shall have the emblements, 30 Ed. 3. 9. that by the surrender of parcel, the whole rent is extinct; *per Monson*. 14 Eliz. Note; Surrender is a good plea in bar for rent incurred after, 9 Ed. 3. 7. Note; The case is stronger if it be of a lease for lives, and yet such was held good, but overruled for miscounting, i. e. not shewing the commencement. 30 Ed. 3. 10. See 14 H. 6. 41. 38 Ed. 3. 10. *contr.* 19 H. 6. 4.

who

who would have him detained, shall have an action of debt against the gaoler.

C If a man recover damages in an action of waste, he may have an action of debt upon the recovery, if he will. 43 Ed. 3. 2.

D And so a man may have an action of debt upon a statute-merchant or staple, or upon a recognizance, or may have execution according to the statute, at his pleasure. 3 Ed. 4. 27. Quære. 34 Ed. 3. 2.

E A prior recovered an annuity in fee against a parson, and afterwards sued a *scire facias* upon that recovery against the successor of the parson, and recovered in the *scire facias* the arrearages of the annuity, and afterwards brought an action of debt against the parson upon the recovery in the *scire facias* for the arrearage, and it was maintainable. P. 17 Ed. 4.

F (a) An abbot shall be charged in an action of debt for victuals, or other necessary things bought by the butler, or other officer who is deputed to make purveyance for the abbey in time of vacation. 26 Ed. 3. 55. Debt 165.

G (b) If a man levy reasonable aid of his tenants for the marriage of his daughter, and die, the daughter not married, the daughter shall have an action of debt against the executors of her father for the aid levied; and if the executors have not any thing, she shall have an action of debt against the heir for that aid, if he have any thing by descent. 3 Ed. 3. Itin. North. Fitz. Debt 57. Supra 82. I. A.

H (c) If two coparceners make partition, and one grant or promise unto the other a certain sum of money for the equality of the partition, she shall have an action of debt upon this promise, and shall recover the money. 30 Ed. 3. Debt 131.

(a) So for money borrowed or lent, which came to the use of the house, 41 Ed. 1. Debt 127. so if the commonk makes a deed, testifying the debt. 4 Ed. 2. Debt 168. and see 35 Ed. 3. 48. 26 Ed. 3. 55. 7 Ed. 3. Debt.

(b) See 3 Ed. 3. Debt 157. it shall be in the *debet* against an heir.

(c) 14 Ed. 3. Debt 137. Co. Lit. 169. b.

12 R. 2. Debt.
44 Ed. 3. 21.
44 Ed. 3. 2.
29 H. 5. 24.
If a man become
debtor for an-
other by word,
it shall not make
him debtor, if
not by the custom
of London.

(d) If a man make a tally, and make bond thereupon, I
and seal and deliver it as his deed, yet it shall not bind
him, but he may plead against the same, that he owed him
nothing, or wage his law. For an obligation ought to be
made in writing in parchment or paper, and not written
upon any piece of wood, as a tally is.

And a man shall have an action of debt against him who K
becometh pledge for another upon his promise to pay the
money, without any writing made thereof; *quod vide* in
title *de Pleg. acquietand'*, P. 43 Ed. 3.

(a) *Writ de rationabili Parte Bonorum.*

If the father
hath two sons,
and maketh one
of them his exe-
cutor, quære if
he shall have any
part as son, be-
cause he is exe-
cutor, and hath
advancement by
that. A woman
did demand the

moiety of her husband's goods, because he had no children, and counted upon the custom of the realm. 31 Ed. 3. But 21 H. 6. 1 and 2. seemeth, it is by custom, and not by the law of the land, 7 Ed. 4. 20. ac. M. 19 and 20 Eliz. in B. R. A writ was brought and allowed there, notwithstanding that exception was taken at it, that it was maintainable by special custom in London. 1 Ed. 4. 5. Pilling. ac.

30 H. 6. Respond 95. A woman brought the writ for the moiety, and counted upon the custom, not speaking of any town, or that it was the custom of the realm. 28 H. 6. 4. 40 Ed. 3. 8. 3 Ed. 3. Debt 156. Counts by the custom of the town of Northampton, 17 Ed. 99 and 76. and that it is by the common law. 7 Ed. 4. 20. Exception was taken, because he did not count that the custom did continue.

(d) See 2 R. 2. Debt 4. 12 H. 4. 23. 25 Ed. 3. 40.

(a) Note; This writ is not *debet* but *detinet*, and so is not within the stat 21 Jac. 1. of limitation of actions; adjudged Trin. 6 Car. 1. in C. B. Sherwins's case. 2 Ld. Raym. 935.

See 30 Ed. 3. 26. That it does not lie against executors, &c. nor against a stranger who is possessed of goods only, 39 Ed. 3. 9. yet it seems

to lie against an administrator *de bonis non*, by custom in *Suffex*, that where the father dies seised of goods, his heir shall have a reasonable part. See 7 Ed. 4. 2. 31 Ed. 3. 25. 1 Ed. 2. *Detinue* 56. 31 H. 8. *Bro. rationabil. Part. 6.* 17 Ed. 3. 9. 17 Ed. *Detinue* 78. or 58. *F. Detinue* 32. 34 Ed. 2. *Detinue* 60.

* This writ was saved, not created by *Magna Charta*, c. 18. 2 *Inst.* 33.

common law, that after the debts paid, the goods shall be divided into three parts: one part for the wife, another part for sons and daughters, and the third unto the executors; but yet the writs in the Register rehearse the customs of the countiēs, and are of this form:

The king to the sheriff, &c. If A. who was the wife of B. &c. shall make you secure, &c. then summon, &c. C. and D. executors of the testament of the aforesaid B. that they be, &c. to shew (b) wherefore, whereas according to the custom which has hitherto obtained in the county aforesaid, wives after the death of their husbands ought to have a reasonable part of the goods and chattels of their said husbands, they the said executors unjustly detain from the aforesaid A. her reasonable part, to the value of ten marks, of the goods and chattels which were of the aforesaid B. some time her husband, and refuse to render the same to her, to the great damage and grievance of her the said A. and contrary to the custom aforesaid: and have there the summoners and this writ, &c. 29 Ed. 3. 10.

And the like writ the sons and daughters may have against the executors; and the form is:

2 Ed. 2. Fitz.
Detinue 561.
30 Ed. ib. 52.
And see 31 H. 8.

It hath oftentimes been put in use at common law, and never demurred upon.

The king, &c. Because A. of N. and S. his sister, have made us secure, &c. summon, &c. I. of H. and E. executors of the testament of R. of N. that they be, &c. to shew wherefore, whereas according to the custom which hath hitherto obtained and been approved in the county aforesaid, the children after the death of their fathers, who are not their heirs (a) nor were promoted in the life of their fathers, ought to have their reasonable parts of the goods and chattels which were of their fathers aforesaid, they the said executors unjustly detain from the aforesaid A. of N. and S. after the death of the aforesaid R. their father, whose heirs they are not, nor who in the life of

Marriage is no advancement, if the father's good be not given in his life, for issue was taken thereupon. 3 Ed. 3. Debt 155.

(b) See the writ, *Quare cum secundum consuetudinem totius regni Angl. usitat' & approbat'*, &c. adjudged good. 30 Ed. 3. 26.

(a) So note, the marriage is excluded. 1. If it be not by her fa-

ther. 2. If she be not promoted. 3 Ed. 3. Debt 156. See 1 Ed. 2. Detinue 56. 186. 30 Ed. 3. 26. 39 Ed. 3. 9. 40 Ed. 3. Bro. rationab. Part. 8.

their said father were promoted, their reasonable parts to the value of ten pounds, &c. (as above).

Señta ad Molendinum.

Quære, If a man may create a tenure at this day upon a gift in tail, or such estate, P. 20 Eliz. Com. B. A lease was made for life of parcel of the demesnes doing suit to his mill, and good.

SECTA ad molendinum lieth, where a man by an usage M time out of mind, &c. hath used to grind his corn at the mill of B. and afterwards he goeth unto another mill, and (b) withdraweth his suit from B.'s mill, then may he have this writ. And also it seemeth, that the lord may have this writ against his free tenants who hold of him to do suit at his mill, and yet he may distrain his tenants for the suit, and avow for the same.

(c) And by prescription a man may have suit to his mill A of the villains of a stranger, and have *señtam ad molendinum* against them, and that it seemeth by reason of their residence in certain lands which they dwell upon. And this writ is sometimes *vicontiel*, and shall be sued in the county by a writ of *justicies*, at the plaintiff's pleasure, or in the common pleas by a *præcipe*, &c. and the form of the writ in the county is such:

[123]

Note, That tenant for life of a manor shall not have this

writ, because it is in the debet & solet. 20 Eliz. Dyer. Br. Note 127, 128. Vid. 128. B. Curia claudenda lieth for tenant for life, and yet the writ is, debet & solet.

The king to the sheriff, &c. We command you, that you justice A. that justly and without delay he do his suit to the mill of E. of N. in C. which he oweth to it, and hath been used to

(b) Note in Mich. 3. Car. 1. it was held in the exchequer, that if the king has a manor by wardship or otherwise, within which is a mill, all the tenants customary and others within such manor shall grind their corn at the said mill, though they are not bound thereto by tenure or otherwise, viz. during the king's seisin; and this by the ancient prerogative of the king.

(c) See 22 H. 6. 14. *Señta ad Molend.* may be maintained as well by

prescription against the reftants, as by tenure against the tenants.

See 29 Ed. 3. 12. 17. Note there, the writ was, that he had suffered six villains of the same vill, who held six carves, &c. and who ought to grind their corn growing in the same lands at his mill, and shews how much each held, and also shewed seisin and explees, and recovered.

do, as it is said, as he can reasonably shew that he ought to do the same to it, that we may hear no more clamour for want of justice. *Witness, &c.*

And if the writ be sued in the common pleas, the writ shall be thus :

Command A. that justly and without delay he do suit to the mill of E. of N. in C. which he oweth to it, and hath been used to do, as it is said: and unless he will do it, &c. then summon, &c.

- B** And by the rule in the Register, a man shall have a writ of *seēta*, &c. *quod faciat seētam ad furnum, & ad thorale, & ad omnia alia hujusmodi.* And tenant for life, or in dower, may maintain this writ in the *debet* & *solet*, for this is of the nature of a writ of the possession: but in the *debet* only
- C** seemeth to be in the meer right. And the defendant shall have a view in a *seēta ad molendinum* in the *debet* & *solet* of land, &c. of the mill in which the suit is to be
- D** done (a). And the process in a *seēta ad molendinum* shall be summons, attachment and distress, &c. and if he appear after default, then shall issue a *distringas ad audiendum*
- E** *judicium*, and yet he may save his default (b). And you may see the form of the count in this writ in the book of *entries*, where he counteth upon a tenure of land, &c. and another count, where he counteth (c) upon prescription: Sc. that the tenant, and all those who held those lands, have used to do their suit at his mill; *quod vide fol. 169.*

(a) See 17 Ed. 3. 29. But not to vouch, 4 Ed. 3. View 149. 13 Ed. 3. Voucher 116. yet aid lies therein, although he were seised of the suit by the hands of him who prayed aid. 17 Ed. 3. 64.

(b) See 12 Ed. 3. Process 28. 18 Ed. 3. Judgment 120.

(c) See 17 Ed. 4. 64. 22 H. 6. 14. 28 Ed. 3. 12.

Quod permittat.

QUOD permittat lieth where a man hath common ^F of pasture for his cattle, and he is disturbed by a stranger, that he cannot use his common, then shall he have this writ: and this writ may be sued by *justicies* in ^G the county, or in the common pleas; and the form of the writ is,

27 H. 8. 12.

The king to the sheriff, &c. We command you, that you justice A. that justly, &c. he permit B. to have common of pasture in N. for one hundred sheep, &c. or for one hundred oxen, &c. which he ought to have, as it is said, as he can reasonably shew, that we may hear no more clamour thereupon, &c. or thus, common of pasture in the land of him the said A. which he ought to have therein, &c. Or thus, That he permit A. to have common of pasture in one hundred acres of him the said A.

V. 2 H. 4. 13.
View grantable
in this writ,
yet it is said
3 Ed. 3. that
the defendant
cannot vouch in
a quod permittat.
for that it is not a præcipe quod reddat. Vide 45 Ed. 3. 8. in the view.

And the rule in the Register is, when common of pasture is claimed in the land of any person certain, then the certain number of cattle are not put in the writ, &c. but the form of the *quod permittat* sued in the common pleas is such:

The king to the sheriff, &c. Command A. that justly, &c. he permit B. to have common of pasture in N. and in forty acres of wood, which he ought to have, as it is said: and unless he will do it, and the aforesaid R. shall make you secure, &c. then summon, &c.

And another form of the writ for common append. thus:

Note; This writ is in the nature of a writ of entry upon a disseisin made to his ancestor.

The king to the sheriff, &c. Command A. that justly, &c. he permit B. to have common of pasture in N. which belongeth to his freehold in the same town, or in another town, of (a)

(a) And note; it ought to make the defendant privy to him that did the tort. 13 Ed. 3. Brief 676.

which

which be the said A. or the father of the aforesaid A. whose heir he is, unjustly and without judgment disseised R. the father of the aforesaid B. whose heir he is, after the first passage over of lord Henry the son of king John into Gascony, as it is said: and unless, &c.

H And the rule in the Register is, that the writ of *quod permittat* lieth of common of pasture, turbary, piscary, and reasonable estovers, against a disseisor of a disseisin to the plaintiff of his ancestors, by him and his ancestors, and not in other degrees, because then he ought to have a writ of right in the *debet & solet*.

But an abbot may have a writ of *quod permittat* of a disseisin made unto his predecessor, and shall make mention of the disseisin in his writ.

I And the form of the writ *Of free (b) fishery*, is such:

The king, &c. Command A. &c. that, &c. he permit B. to have free fishery in the water of him the said A. in N. or thus, in the water in N. which he ought and hath been used to have in the same, as it is said: and unless, &c.

K There is another form of the writ of *quod permittat*, in the nature of *mortdauncestor*, and is such:

The king, &c. Command A. that, &c. he permit B. to have common of pasture in N. in which C. father, or mother, or sister of him the said B. whose heir he is, was seised, as of fee (c), as belonging to his or her freehold in the same town, the day whereon he or she died: and unless, &c.

L And if it be a common in gross, then he ought to put this clause in the writ, *As belonging to his freehold, &c.*

And so a parson or an abbot shall have a *quod permittat* of the seisin of his predecessor, and the writ shall say,

Command, &c. that he permit B. parson of the church of C. to have common of pasture in N. of which F. some time parson of C. aforesaid, &c. was seised, as in right (d) of his

3 Ed. 25.
Quod permittat
1.

31 Ed. 3. Quod
permittat 8.
30 Ed. 3. 3.
Quod permittat 4.
A prebend had
the writ for mea-
suring a water in
the time of his
predecessor.

(b) Note; A *præcipe* does not lie *pro piscaria in aqua*, but *pro piscaria* generally, for thereby the soil itself is to be recovered. Temp. Ed. 1. Brief 361. 4 Ed. 3. Feoffment 79.

(c) *Ut de feodo*, add *& de jure*. 31 Ed. 1. Brief 874.

(d) *Ut de jure ecclesiæ*, or *ut de feodo ecclesiæ*. 31 Ed. 1. Quod permittat 8.

church aforesaid, the day whereon he died, as it is said: and unless, &c.

And the rule in the Register is, that in the same manner as is said before of common of pasture, so it may be said of all other commons, as of turbary, piscary, &c.

And there are divers other writs of *quod permittat* of another nature; as a man shall have a *quod permittat* against the lord, to suffer his villains to do suit to his mill, &c. and that accrueth by usage and prescription; the writ is,

[124] *The king, &c. Command A. that justly and without delay A he permit (a) his villains of C. to do suit to the mill of B. &c. in E. &c. And unless, &c. and the aforesaid B. shall make you secure, &c. then summon, &c.*

If the miller
taketh toll, then
trespass lie h:
but if the tenant
of the freehold
take it, a *quod*
permittat
41 Ed. 3. 24. &
44 Ed. 3. ac.
Vi. Ed. 1. Br.
Battail 13. 6.
Quod permittat
9. a *quod per-*
mittat brought
of estovers.

And another writ. Command A. &c. that he permit B. to grind his demesne corn of N. at the mill of him the said A. in N. quit of multure, which he ought and hath been used to grind at the same mill, as it is said: and unless, &c. Or, command A. &c. that he permit B. to draw water at the well of him the said A. in N. as he ought and hath been used to draw at it, as it is said: and unless, &c. Or, That he permit B. to water his flock at the water of him the said A. in N. as he ought and hath been used to water it, as it is said. Or, That he permit B. to have his free bull in N. as he ought and hath been used to have, as it is said. Or, That he permit B. to have a certain way over the land of him the said A. in N. &c. Or, That he permit B. to have his free fold in his demesne lands in I. which he ought and hath been used to have. Or, That he permit B. to have free fishery in the water of him the said A. in N. &c. Or, That he permit B. to have free passage over the river Humber in the ship of him the said A. which he ought and hath been used to have in it, as it is said, &c. And unless, &c. But a man shall not have a *quod permittat* of reasonable estovers in a wood, or in turbary, or in heath, and the like.

(a) See 17 Ed. 3. 67. 18 Ed. 3. 56, 57. 29 Ed. 3. 13. And note that in this writ esplees are bound in the multure, and not in the toll, for that the mill itself is not in demand. See 18 Ed. 3. 57. *si ne defend. damages solemnt.*

And the like by the rule in the Register, for in lieu thereof is given the writ of assise of *novel disseisin* by the statute of *West. 2. cap. 26.*

And a man shall have a writ, *That he permit him to erect ladders in the soil of him the said L. in B. contiguous to his mansion, for covering and repairing his houses there, as often as need shall be, as he ought and hath been used to erect them, as it is said: and unless, &c.*

And a man may have a writ of *quod permittat* of a *corrody*; as, *command P. prior. &c. that he permit B. to have competent sustenance for himself and one boy in victuals and apparel, and in all other necessities, and in provender for one horse every day; and also competent sustenance for four men of the company of the said B. four boys, four horses, four harriers, and four sparrow-hawks every year, at the feasts of the birth of our Lord, Easter, Pentecost, and All-Saints, and for three days after every of the said feasts, in the priory of C. &c. of which E. some time prior of the place aforesaid unjustly, &c. disseised F. father of the aforesaid B. whose heir he is, after the first passage over of, &c.*

And in a *quod permittat habere chimum*, in the nature of the writ of right, and to hold suit, and dereign the warrant, &c. the defendant came and joined the mise upon the mere right, and was received.

30 Ed. 1. *Quod permittat* 10.
Br. Battail 13.

B (b) And in a *quod permittat* by a parson, he counted of the fee and right, and held suit, and dereign, &c. and the tenant came and gaged battail, &c. *Tempore Regis, Ed. 1.*

4 Ed. 3. 48.
Quod permittat 7.

And tenant in tail shall have a *quod permittat* (c).

C (a) And in a *quod permittat* of a common the tenant alledged the darrein seisin in the plaintiff; and it was adjudged

(b) 30 Ed. 1. *Quod permittat* 10. 17 Ed. 3. 67. a *quod permittat* by tenant for life; so 4 *Aff.* 3.
(c) *Temp. Ed. 1. Quod permittat*
9. 4 Ed. 3. pl. 39. 4 Ed. 3. 2. Of common, &c. See a *quod permittat* of common of pasture of his own seisin, it shall bind esplees, &c. and he tendered suit, &c. And the writ was in the *debet & solet*. Pole defended it, and joined the mise or issue, whether
so shall a tenant for life. 4 *Aff.* 3.
(a) See a *quod permittat* by tenant in tail in the *debet & solet*. 4 Ed. 3. 46. See 4 Ed. 4. 24. 3 Ed. 3. 25.

judged a good plea to abate the writ. But there the plaintiff counted of the seisin of his ancestor: for a man shall have a *quod permittat* of his own seisin, as it seemeth.

And a *quod permittat* him to reduce a watercourse, &c. D which is mis-turned, will well lie.

2 H. 4. 13. ac.

And a man shall have a *quod permittat* against the tenant of the freehold for an act done, or a disturbance done by a stranger who was not tenant of the soil. E

30 Ed. 3.

And the process in a *quod permittat* is summons, attachment and distress: and if the sheriff at the summons return *nihil*, the plaintiff may pray a (b) *capias* and have it, *Quod vide* H. 39 Ed. 2. F

And the form of a count in a *quod permittat* appears in the book of entries, fol. 80. on the first side. G

And if a man build a house, or a wall, or other thing which is a nuisance unto the freehold of another, and dieth; he whose nuisance it is shall have a writ *quod permittat* against his heir that did the nuisance, and the writ is such: H

The king to the sheriff, &c. Command A. that justly, &c. he permit B. to pull down a certain house, or a certain wall, or a certain hedge, or a certain mill, or to fill up a certain ditch, which R. the father, or other ancestor of the aforesaid A. (c) whose heir he is, unjustly and without judgment raised or made, to the nuisance of the free tenement of C. the father, or other ancestor of the aforesaid B. whose heir he is, in the same town or in another town after the first, &c. as it is said, and unless he will do it, &c. Or thus: That he permit B. to raise or

whether he had the better right to hold in severalty, (as he tendered it) or the demandant to have the common, &c. and resolved, 1. That the writ being in the *debet* & *solat*, and so a writ of possession, that the mise should not be joined. 2. That he could not have a writ of his own seisin in the *debet*; but because the parties were agreed, that the mise should stand, the writ was amended, and *solat* struck out. T. 16 Ed. 3.

(b) And after appearance a *distingas* in lieu of a *petit cape*, and therefore in a *quod permittat* against two, they shall not fourch *per Distress*, 38 Ed. 3. 1. contra 14 H. 4. See 30 Ed. 3. 3. Note; the party there came in by the *capias*, and therefore was put to answer.

(c) Or *prædecessor*, and therefore if the writ be general, *ad no.umentum liberi tenementi sui*, it is a good plea to say, that it was not done in his time. 2 H. 4. 13.

lower

lower a certain pool in L. which the aforesaid A. unjustly lowered or raised, to the nuisance of his freehold, or of C. father of the aforesaid B. &c. Or thus: That justly, &c. he permit B. to bring back again the course of a certain water in L. into its right and antient course, which C. the mother of the aforesaid A. whose heir he is, diverted, to the nuisance, &c. Or thus: That justly, &c. he permit B. to open a certain way in N. which C. father of the aforesaid A. whose heir he is, unjustly stopped up, &c.

(a) And if a man levy a nuisance unto the freehold of another, and he to whom the nuisance is done make a feoffment in fee of the land; and he who did the nuisance make a feoffment of the land in which the nuisance is; yet there is a writ in the Register for the feoffee of him to whom the nuisance was levied against the feoffee of the other, to reform that nuisance, and the writ is such:

The king to the sheriff, &c. Command C. that justly, &c. he permit B. to make broad a certain way in N. which C. unjustly and without judgment made narrow.

But this writ is not given by the statute, but he may sue, &c. by the statute *West. 2. in casu consimili, &c. c. 2. 4.*

A And a *quod permittat* of a fair or market shall be sued in the common pleas; and the writ is such:

The king to the sheriff, &c. If A. shall make you secure, &c. then summon B. &c. that he be before our justices, &c. to shew wherefore he hath set up a certain market, or a certain fair in I. to the nuisance of the free market, or free fair of him

[125]

Or Bailiw.
34 Ed. 1. Br.
Demand 43.

(a) So is *Penruddock's* case, 5 Co. after a request to abate it. See 4 Aff. 3. 4 Ed. 3. 36. 5 Ed. 3. 43. The father erects a lime-kiln, which is a nuisance to B. and after discontinues the use thereof, and then B. makes a lease for life; then the father uses the lime-kiln and dies, and the son does not abate it on request; a *quod permittat* lies against him; but if the father had levied it before the lease, and had from time to time used it during the lease, then it had been

otherwise. Note; The writ there was, *Quod pater levavit ad nocumentum liberi ten'ti sui.* The defendant says, that he had a there, and used it before the lease, &c.

It seems by the statute, it shall be brought against him that did the tort, and the tenants after the alienation, *West. 2. cap. 24.* also it lies for a successor; and note; in such case the alienee may have aid of him in the reversion or remainder. *Quære* 30 Ed. 3. 26. 4 Aff. 3. Reg. 194.

Writ of Admeasurement of Pasture.

the said A. in the same town, or in another, after the first, &c. as it is said. And have there the summoners, &c.

And the like writ for the heir, where the father levieth the market or fair unto the nuisance of another fair or market; or for the heir against him who levieth the nuisance, &c.

Writ of Admeasurement of Pasture.

THE writ of admeasurement of pasture lieth between twixt commoners who have common appendant to their freeholds, if one of them surcharge the common by putting in more cattle in the common, than he (*b*) ought to have common for there, then that commoner who is grieved shall have this writ of admeasurement of pasture; and by this suit all the commoners shall be admeasured, as well those who have not surcharged the common, as he who hath surcharged it, and he who bringeth the action shall be also admeasured.

8 H. 6. 26.
Ant. 125.

View in the action. 3 H. 6. 26. Voucher; also 32 Ed. 3. Voucher 194.

(*a*) And the writ is *vicontiel*, and shall be directed unto the sheriff, and shall not be returnable; and the form of the writ is such:

The king to the sheriff, &c. A. hath complained unto us, that B. and C. his wife have unjustly surcharged his common of pasture in N. so that they have in it more beasts and cattle than they ought to have, and than it belongs to them to have; and therefore we command you, that justly and without delay you admeasure that pasture, so that the aforesaid B. and C. may not have in it more beasts and cattle than they ought to have,

(*b*) Note; If *A.* grants to *B.* common for one thousand cattle in four carves, and after grants to *C.* common in the same land for one hundred beasts; if by the second grant the beasts of the first grantee cannot have sufficient, the second grant is void against *B.* 18 H. 6. 30. Note; The writ shall be brought against him only who surcharges; and in this writ all

shall be admeasured, but not to their prejudice, seeing they are not parties to the suit. 8 H. 6. 26.

(*a*) Admeasurement seems not to lie for common appendant, or for common by specialty *sans* number; but for him who has common appurtenant, or a certain common by grant or specialty if he surcharge. 22 Aff. 55.

and

and it belongs to them to have, according to their freehold which they have in the same town, and that the aforesaid A. may have in that pasture so many beasts and cattle as he ought to have, and it belongs to him to have, that we may hear no more clamour, &c.

Note, this writ is vicontiel, and the statutes are the judges by 7 Ed. 4. 23. 18 Ed. 3. Admeasurement 7. a notable case.

D (b) And if the tenant surcharge the common with his cattle, &c. the lord shall not have the writ of admeasurement against the tenant; but it seemeth the lord may distrain the surplusage of the cattle damage feasant. And some say, that the lord may have an assise against the tenant for the surcharge, for that he is disturbed of the profit of his land. *Quære* of these cases (c).

(b) He cannot distrain the surplus, where the tenant has common appendant, until it be admeasured, 10 Ed. 3. 51. 18 Ed. 3. Admeasurement 7. *per curiam*, and yet he may approve it.

Note; The lord may have an admeasurement; but he himself shall not admeasure, *Temp. Ed. 1. Admeasurement 12.* See 6 Co. 54. Corbet's case.

(c) See *Bract.* 229. That the lord may have admeasurement against his tenant, or *e converso* for a commoner against the lord. *Temp. Ed. 1. Admeasurement 16.* Not against the lord, because he cannot approve, but against the tenant who is not lord. *Ibid.* 11. 18 Ed. 3. 80. Admeasurement 7. If there are two neighbours in a vill, who intercommon each in the other's land, admeasurement does not lie between them; but if there are three neighbours A. B. and C. and each intercommons in the other's land; if one of them surcharge, the whole admeasurement lies, for he had common in the lands of the three, &c. But where there are only two neighbours A. and B. admeasurement does not lie, for there on a surcharge, the remedy is by assise as tertenant, and not as a commoner; and a tertenant

cannot be admeasured; but where there are three commoners or more who intercommon, each shall be admeasured in the lands of the other, 18 Ed. 3. 43. 30. Admeasurement, when against tenant of the soil. *ibid.* 4. See 18 Ed. 3. Admeasurement 7. 19 Ed. 3. 30.

Note; The writ of admeasurement lies, though the plaintiff has disseised the tenant of the common, if he continues seised of the land to which, 8 Ed. 2. Admeasurement 14. And if the defendant has common appendant to his freehold in three vills, it may be admeasured for the lands in one of the vills. *Temp. Ed. 1. ibid.* 15. Note there, if one has common appendant, and the lord of the soil grants him common there for two hundred beasts more, whereby the common is surcharged; admeasurement lies against him, and he shall admeasure within the number granted him, and shall be put to vouch his grantor to warranty. *Temp. Ed. 1. ibid.* 16. and *Brief* 862. See 22 *Aff.* 65. Admeasurement 11.

Note; If the lord leave sufficient common, but the way is not at so good ease or plight as it was before, assise of common lies, by *Stour.* 11 H. 4. 26.

But

18 Ed. 2. 20.

But if the lord surcharge the common, the tenant shall not have a writ of admeasurement against the lord, but he shall have an assise of common against the lord.

See 179. E.
126. D. E.
4 Burr. 24. 31.
3 B. Comm.
239.

And so if the lord make approvement of the common unto himself, and leave not sufficient common to the tenant, the tenant shall have an assise, and not a writ of admeasurement. And he who hath common appurtenant certain, or common by grant certain, shall be admeasured; and a tenant shall have an admeasurement against him; but he who hath a common appurtenant without number, or common in gross without number, shall not be stinted, nor doth a writ of admeasurement lie against him.

And in the time of *Ed. 1.* it was agreed, That one neighbour shall have a writ of admeasurement against another, where they intercommon by reason of neighbourhood. E

And if the sheriff will not make the admeasurement, he shall have an *alias* and *pluries*, *vel causam nobis significes*. F
And if he do not return the *pluries*, he shall have an attachment against the sheriff. And the plea may be removed out of the county by a *pone*, at the suit of the plaintiff, without shewing cause in the writ. But at the suit of the defendant he ought to shew cause in the writ; and the writ of *pone* is such:

Supra 70. B.
119. K. Infra
128. A.

Put, at the petition of the plaintiff before our justices, &c. such a day, the plea which is in your county by our writ between A. and B. of admeasurement of common of pasture in N. and summon, &c. the aforesaid B. that he be then there to answer the aforesaid A. thereupon, &c. And have, &c. this writ and the other writ.

7 Ed. 4. 22.
Danby.

And upon this writ of admeasurement the plaintiff shall enter his plaint in the county before the sheriff, as he would do in a replevin sued by writ, and upon that the sheriff shall make a warrant against the defendant, &c. and warn him to appear; and if he come and plead nothing in bar, or grant it, then the sheriff shall make the admeasurement. G

In a writ of admeasurement brought against one of common in *D.* the defendant said that he had lands in *B.* and *S.* to

S. to which he had common in the same place, and yet the writ good; for it is holden there, that the ouster of the surcharge shall not be in the same place only, yet it seemeth all the common shall be admeasured. *Temp. Ed. 1. Admeas. 15.*

But if the defendant shew cause unto the sheriff wherefore the admeasurement should not be made, then the sheriff ought not to make admeasurement upon this writ; but the plaintiff ought to remove the plea by a *pone* into the common pleas, by which *pone* the defendant shall have day to appear, &c. And if he appear not, then shall issue a *distringas* directed to the sheriff to distrain the party, and such day shall be given by that writ, that two counties may be kept between the date of the writ and the return, and in the counties proclamation shall be made, that he come and shew cause why the admeasurement should not be made. And if he do not come at the return of the *distringas*, then a writ shall be awarded unto the sheriff, to make the admeasurement by his default; and that is given by the statute of *West. 2. c. 8.* and the writ is,

H *The king to the sheriff, &c. Whereas A. hath lately complained to us, that B. and C. have surcharged his common of pasture in N. so that they have more beasts and cattle in it than they ought to have, and it belongs to them to have: wherefore we commanded you, that justly and without delay you should cause that pasture to be admeasured, so that the aforesaid B. and C. might not have in it more beasts and cattle than they ought to have and it belonged to them to have, according to their freehold in the same town; and that the aforesaid A. might have in that pasture so many beasts and cattle as he ought to have and it belonged to him to have, &c. that we might hear no more clamour, &c. and you have done (a) nothing thereupon, as we have received information from him the said A.: and whereas we have ordained in our writ of admeasurement of pasture, that after the grand distress days be given, within which*

(a) *Note*; Though *nihil* be returned to each of the three writs, yet by the statute they shall proceed to the admeasurement.

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two counties may be holden, whereat proclamation shall be made, that the defendant come in to answer the plaintiff; on which day, if he do not come, admeasurement may be made by default: we command you, as we have heretofore commanded you, that justly and without delay you cause the aforesaid pasture to be admeasured, according to the tenor of our other writ thereof to you directed, and according to the form of our statute thereof provided and set forth, that we may not be again solicited upon this matter by the aforesaid A. Witness, &c.

And when the plea is removed by *pone* in the common A pleas, and the plaintiff appears and the defendant also, then the plaintiff shall count against the defendant; and see the form of the count in the book of *Entries*, fol. 128.

And if the defendant grant to have the admeasurement, B a writ shall issue to the sheriff to make admeasurement, which shall be such:

The king to the sheriff, &c. We command you, that taking with you twelve, &c. by whom, &c. who neither, &c. you go in your own person to admeasure the common of pasture, and by their oath you cause the common of pasture aforesaid to be admeasured, so that the aforesaid S. and D. may not have more, &c. than to them belongeth to have, according to their freehold which they have in that town: and that the aforesaid R. may have in that pasture so many beasts and cattle as he ought to have and it belongs to him to have, according to his freehold which he hath in that town, and the admeasurement, which, &c. you make known before our justices under your seal and the seals of those, &c.

After the *pone* returned to remove the plea out of the C county, if the defendant make default at the day of the return of the writ, then shall issue a writ to the sheriff to distrain the defendant, and in the writ shall be contained, that he make open proclamation in two counties, &c. that the defendant come into the common pleas at the day of the return of the *distringas*, to answer to the plaintiff, &c. And if the sheriff return the writ served, and the

the defendant do not come, then shall issue a writ to the sheriff to make the admeasurement.

D And it appeareth by the book of *Entries*, fol. 123. See 125. D. That a writ of admeasurement doth not lie against the lord of the soil (b).

E And if a man be once admeasured by a writ of admeasurement directed unto the sheriff by the sheriff, &c. and afterwards he surcharge the common again, then the party who sued the first writ shall have a writ to the sheriff, called a writ *de secunda superoneratione*; and the writ is such:

18 Ed. 3. 20. Admeasurement 7. ac^r, and there holden that it lieth not against the feoffee of the lord of part of the demesnes, so that the feoffee is in the same

degree as the lord himself. 8 Ed. 2. Admeasurement 14. In admeasurement of pasture the defendant said, that the demandant, pendent the writ, had ejected him of the common, and no plea; for notwithstanding that he had not the common, he held the land for which the common is surcharged.

The king to the sheriff, &c. A. hath shewed unto us, that whereas he lately brought to you our writ of admeasurement of his common of pasture in N. which B. unjustly surcharged; and you did admeasure that pasture by our command, as the custom is in our realm, &c. he the said B. hath unjustly surcharged that pasture after the aforesaid admeasurement, to the great expence and grievance of him the said A. and contrary to the form of the statute thereupon provided: and because we will relieve the said A. as we are bound to do, according to the form of the same statute, we command you, that you go in your own person to that pasture, and diligently inquire, by the oath of honest and lawful men of your bailiwick, by whom the truth of the matter may be better known, touching the second surcharge of the same pasture; and if you shall find by that inquest, that the pasture was again unjustly surcharged by the aforesaid B. after the admeasurement, then that you answer to us at the exchequer for the beasts beyond the due number put into the pasture after the first admeasurement, or for the price of them, and remove the surcharge abovesaid.

F And it appeareth by this writ, that a man shall have a writ *de superoneratione* upon the first writ of admeasure-

(b) See 2 H. 6. 41. And there some hold that the defendant shall have admeasurement. See 8 H. 6. 27. 9 H. 6. 41. 2 Inst. 83.

ment of pasture, which is *vicontiel*, and directed to the sheriff, if the sheriff make admeasurement upon that writ, and afterwards the defendant surcharge the common again, as well as upon a writ of admeasurement awarded out of the common pleas upon a judgment there given, &c. But upon the writ of admeasurement awarded to the sheriff, by which he maketh admeasurement, if the defendant surcharge the common after, the writ of *secund' superoneratione* shall be awarded out of the chancery: but upon a judgment given in the common pleas of admeasurement, &c. if the defendant surcharge the common, the writ of *secunda superoneratione* shall be awarded out of the common pleas; and the form of the count in a writ of admeasurement is such:

And whereupon the aforesaid plaintiff complains, that where- G
as he is seised of one messuage with the appurtenances in S. to which he the said plaintiff hath and ought to have common of pasture, with four horses, in one hundred acres of pasture called B. every year throughout the whole year, appurtenant. And the aforesaid defendant is seised in his demesne as of fee of four yard-lands with the appurtenances in the same town, to which the said defendant hath and ought to have common of pasture, with one hundred horses and twenty oxen, &c. every year throughout the whole year, appurtenant; the aforesaid defendant hath unjustly surcharged the common of pasture aforesaid called B. so that he hath more beasts and cattle in it than he ought to have, and to him belongs to have; whereupon he saith that he is injured, and hath sustained damage to twenty pounds, and prays admeasurement.

3 Bl. Com. 239.

And by the writ of *secunda superoneratione* the plaintiff H
shall recover his damages against him that was defendant in the first writ, and also he shall forfeit unto the king the cattle which he put in over the due number after the admeasurement made. And all this is by the statute of *West. 2. Vide ant. 125.*

(a) And note, That by the writ of admeasurement all I

(a) But note; The judgment on the admeasurement, is only to extend between the parties: for if any other be aggrieved, he ought to bring a new admeasurement. 18 Ed. 3. *Admeasurement* 7.

the commoners shall be admeasured as well as those who were parties to the writ. But if any of those who are commoners, but not parties to the writs of admeasurement, &c. surcharge the common after admeasurement, they shall not forfeit their cattle, nor the value of them that were in the pasture above the due number, because they were not parties to the first writ, nor shall the party recover damages against them for this surcharge in this writ. For the writ of *secunda superoneratione* doth not lie but only against him, against whom the first writ was sued forth.

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Writ de Reparatione facienda.

A THE writ *de reparatione facienda* lieth in divers cases*; one is, where there are three tenants in common or joint, or *pro indiviso* of a mill or a house, &c. which falls to decay, and one will repair, but the other will not repair the same, he shall have this writ against them; and the writ is such:

11 Co. 82. b.

B The king to the sheriff, &c. If A. shall make you secure, &c. then summon, &c. B. and C. that they be, &c. to shew wherefore whereas they the said A. B. and C. hold a certain mill in N. undivided, and receive the issues thereof coming by equal portion, and are bound to repair and keep up the same mill, and they the said B. and C. although they receive their share of those profits, yet refuse to contribute to the reparation and support of the said mill, to the great damage and grievance of him the said A. as it is said: and have there the summoners, &c.

C And so if a man have a house adjoining to my house, and he suffer his house to lie in decay, to the annoyance of my house; I shall have a writ against him to repair his house in such form:

* This writ is grounded on the custom of a place not on the common law.
 1 Ld. Raym. 1093.

11 H. 4. 83.

Command A. that, &c. he cause to be repaired his certain house in N. which threatens destruction, to the nuisance of the freehold of B. in the same town, which he ought and hath been used to repair, as it is said, &c. and unless, &c.

And so if I have a passage over a bridge, and another D ought to repair the bridge, and he suffer the same to fall to decay, I shall have a writ against him in this form :

The king, &c. Command A. that, &c. he together with B. and C. his partners, cause to be repaired a bridge or certain pool in N. which he with them ought to repair, as it is said, and unless, &c. or thus, a certain bridge, or a certain pool which is fallen down, or broken down to the nuisance of (a) the freehold of B. in the same town, which he ought and hath been used to do, &c. as it is said; or thus, to cause to be repaired with B. and C. his partners, the ditches and walls in N. which are fallen down, to the nuisance of the freehold of B. and C. which he ought and hath used to repair with them, as it is said, &c.

And if any bridge, wall or sewer be broken, unto the E annoyance of the country, upon a surmise made by any person thereof in chancery, that certain persons ought to repair the same, he shall have a writ unto the sheriff to distrain such persons to repair the same; but it appear-eth (b) by the Register, that the king shall send his commission to the sheriff to enquire who ought to make such bridge, and that he distrain them to make the same, and repair it. But by the statute of 28 Ed. 3. cap. 9. (c) a commission shall not be made unto the sheriff to take an indictment; and the king may send unto the sheriff to

(a) And note; In this writ the party recovers his damages, and it shall be awarded that the defendant repair, and that he be distrained to do it. 18 Ed. 3. 23. So in this writ he shall have the view; *contra* if it be but an action on the case for not repairing, for there he shall recover but damages. 7 H. 4. 8.

(b) On a commission an inquest was found (and returned into chan-

cery, and sent thence into B. C.) that the abbot of W. and his predecessors, had repaired the bridge of S.

(c) Note; It seems such commissions were principally to redress nuisances which were within the precincts of franchises, or leets of other lords, and so not punishable in the sheriff's turn. 29 Ed. 3. 21.

distrain

distrain those persons who ought to make or repair such a way, or causey, or pavement, and upon it an *alias* and *pluries* if it be not done, and an attachment upon the same; and if the bridge or way be in the confines of the county, he shall have several writs unto every sheriff to distrain them in their bailiwicks, that they, with the men in other counties, shall make and repair the bridges and ways, &c.

F And there is another writ in the Register in the title of the writ of *ex gravi querela*, thus:

The king to the mayor and sheriff of A. greeting: It is shewed unto us on the behalf of W. that whereas he hath a certain cellar with the appurtenances in the said town of A. and I. hath a certain cellar with the appurtenances in the same town, over the cellar aforesaid, which is in a very ruinous state, to the nuisance of the cellar of him the said W. and which by the aforesaid I. according to the custom of the said town ought to be repaired; nevertheless he the said I. refuses to repair that cellar, as it is said, to the great damage of him the said W. and contrary to the custom aforesaid, and because we will not that he the said W. be injured in this matter, we command you, that having called before you the parties aforesaid, and having heard their reasons on each side, you cause due and speedy complement of justice to be done to him the said W. in the premisses, as of right and according to the custom, &c.

And thereupon the mayor and sheriffs, or bailiffs shall proceed, and award process against the parties; and if they will not do it, he may have an *alias* and *pluries*, and attachment against the mayor and bailiffs.

*Writ de Curia claudenda, and for repairing
of Hedges.*

THE writ of *curia claudenda* may be sued before the G
sheriff in the (a) county, and then the writ is
such :

11 R. 2. Curia
claudenda 5. L.
5 Ed. 3. 100.

It ought to be in
the debet and so-
let, and the te-
nant for life shall
have the writ.

2 H. 4. 11. L.
5 Ed. 4. 118.

119. A man
shall have this
writ before he be
damified.

Quia timet.

27 H. 6.

Curia claud.

A nontenure is a
good plea in the
writ.

*The king to the sheriff, &c. That you justice A. that justly,
&c. he inclose his land in N. which is open, to the nuisance of
the freehold of B. in the same town, (or in another town)
which he ought and hath used to inclose, as it is said, and which
he can reasonably shew he ought to inclose, that we may hear no
more clamour, &c.*

And this writ lieth where one ought to inclose his land H
from his neighbour, and will not do it; and the writ may
be sued in the common pleas, and then the writ is
such (b) :

*The king, &c. Command A. that justly, &c. he inclose I
his land in N. which is open, to the nuisance of the freehold of
B. &c. which he ought and hath used to inclose, and unless,
&c. (c)*

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16 H. 7. 9. per
Fineux the judg-
ment is to re-
cover the inclo-
sure and damages.

22 H. 6. 7, 8.

22 Ed. 4. Cur'

claud. Finch

L. 276.

39 H. 6. ib. ac.

And this writ shall be removed out of the county at the A
suit of the plaintiff without cause, and at the suit of the
defendant he ought to shew cause in the writ. And in
the end of the writ shall be this clause: *Let execution of this
writ be done, if the cause be true, otherwise not.*

And the *curia claudenda* doth not lie but against him B
who (d) hath a close next adjoining unto the plaintiff's
land,

(a) Note; A *curia claudenda* shall be brought only in the county where the lands which ought to be inclosed lie, per Skipw. But case shall be brought in that county which is damaged by the non-inclosure; and if issue be on the prescription, the venue shall come *de utroq' comitatu*, per Skipw. 11 R. 2. *Action sur le case* 36, &c. and see there case for an inclosure; and note, the

writ was *ad nocumentum*, 29 Ed. 3. 20.

(b) See 2 R. 2. *Action sur le Case* 36.

(c) See 22 Ed. 4. *Curia claudenda* 2. 1 H. 6. 33. 7 H. 6. pl. 4. 17 H. 6. pl. 4.

(d) Note; The count supposes that the lands of the plaintiff are contiguously adjacent to the close of the defendant,

land, and it doth not lie but for him who hath a freehold in the land, for tenant for years shall not have this writ. And the view lieth in this writ (e).

C But it seemeth that if a man have common in a great waste to him and his heirs, or for life, and he who hath the land adjoining unto the waste and soil, and who ought to enclose, enter into the waste, and will not make this enclosure; yet the commoner shall not have this action for the damages which he sustaineth, &c. (although the commoner may distrain the cattle damage-feasant in the land which is his common) for the writ doth suppose, *Ad nocumentum liberi tenet* of the plaintiff, which proveth that the plaintiff ought to have the soil adjoining, if he have the action (a).

13 R. 2. Cur' claud. 3.
12 H. 8. 2.
24 Ed. 3. 4.
15 H. 7. 13.
5 H. 7. 2.
22 H. 6. 9.

And

fendant, and this is issuable, for none shall have this writ, but he who has the land next adjoining, by *Newton*, 22 H. 6. 8 and 9. and *Moyle contr' Priot*. See 13 H. 7. *Kelw.* 130. 7 H. 6. *Cur' claud'* 4. 13 R. 2. pl. 3. 17 H. 6. pl. 4.

(e) Both for the one and the other's lands, &c. 29 Ed. 3. 21.

(a) Note; If A. be bound to inclose against B. and B. against C. and beasts escape out of the land of C. into the land of B. and thence into the land of A. A. shall not have trespass against C. But if A. be bound to inclose against B. and the beasts of B. escape into the lands of A. and thence into the land of one D. a stranger, there D. shall have trespass, and B. be put to a *curia claudenda* against A. and so the books 10 Ed. 4. 7. and 36 H. 6. *Barr.* 68. are to be reconciled: but it is otherwise if beasts escape in view of the owner, by default of inclosure, as out of a highway, &c. and fresh suit be shewn in justification; but if it does not appear they were in view of the owner, fresh suit shall not be pleaded in bar, except the plaintiff alledges notice.

15 H. 7. 17. 22 Ed. 4. 8. 49. 10 Ed. 4. 8.

Note as to Inclosure.

1. If beasts escape into your land for default of inclosure, where you are bound to inclose, you shall have no advantage thereof on the general issue, but ought to plead in special. 18 H. 8. 6.

2. See the form of the plea; Ought not to have his action against him the said G. because he says that long before, &c. he was seised of a certain close in S. aforesaid called D. contiguously adjoining to the aforesaid close of the said A. called C. in which the trespass aforesaid is supposed to be done, in his demesne as of fee, and that the aforesaid A. and all those whose estate he hath in the close called C. aforesaid, from time whereof the memory of man is not to the contrary, have been used to enclose the said close, and the hedges of the same close towards the close of him the said G. sufficiently to repair and amend, and that before the time when, &c. he the said G. put his beasts into his said close to be depastured, and because the hedges between the close of the aforesaid

And the process in this writ is summons, attachment **D**
and distress, and if he appear and afterwards make default,
he

aforesaid *A.* towards the close of him
the aforesaid *G.* were broken and not
repaired, the aforesaid beasts from the
same close of the said *G.* for want of
sufficient reparation of the hedges of the
close of him the said *A.* at the time afore-
said entred, &c. And this, &c. *Rast.*
Entr. 621. And see the same form
of pleading, int' *Sagevill* and *Millard*
for a trespass in the park of *Cheenye*,
where the plaintiff replied, That he is
seised of a piece of land of seven feet
in longitude (*Latitud'*) & 20 verge
in latitude (*Longitud'*) lying between
the lands of the said *G.* and those of
C. and that the beasts on the day of
the trespass, came into his said piece
of land, and there broke the said
close, &c. *absque hoc*, that the defen-
dant's close is contiguously adjacent
to the close of *C.* *modo & forma.* And
the other party said, *it was*, &c. and
it was found for the plaintiff, and
twenty pounds damages for the piece
of land, and forty shillings for the
close; and it was adjudged that the
plaintiff should recover.

Note; It is a good issue to traverse
the prescription; for if the plaintiff
be not bound to inclose (though he
has voluntarily inclosed) it will be to
no purpose; for if *A.* and *B.* have
lands adjoining, where there is no in-
closure, the one shall have trespass
against the other, on an escape of their
beasts respectively, *Dyer* 372. *Rast.*
Entr. 621. 20 *Ed.* 4. 10. although
wild dogs, &c. drive the cattle of the
one into the lands of the other; and
22 *H.* 6. 9. and the writ shall be
quare clausum fregit, for it is a close in
law.

2. If the defendant pleads that he
is seised in his demesne, as of fee, of
the close of *D.* the plaintiff may re-

ply, that *J. S.* was seised, *absque hoc*,
that the defendant was seised in his
demesne as of fee, and so cause the
precise estate to come in question;
but if the defendant had pleaded ge-
nerally, that he was seised of the close
adjoining, or that the close adjoining
was his freehold; there the plaintiff
shall reply, that he had nothing in the
close adjoining at the time, &c. and
this shall make the issue. *Dyer* 365.
Sir Fra. Leak's case.

3. That *ex consequenti* it follows,
none can have advantage of this justi-
fication, but he who claims an interest
in the land adjoining to *D.* *viz.* a
common path, highway, licence, lease,
&c. and therefore if *A.* be bound to
inclose with *B.* who has a close adjoin-
ing, and the beasts of *C.* who has an-
other close adjoining, escape into the
land of *B.* and thence into the land of
A. *A.* shall have trespass for this;
and so held by *Newton*, 21 *H.* 6. 53.
22 *H.* 6. 9. for they were trespassers
to *B.* otherwise if *C.* had had com-
mon, or a way in the land of *B.* or
(as it seems to me) if *B.* had been
bound to inclose against *C.* 22 *Ed.*
4. *Curia claudenda* 2. adjudged.

4. Hence it follows, that the issue
is well joined in the principal case;
for the defendant had not the close
immediate; so his beasts did wrong,
when they entred into the piece of
land out of the park; and therefore,
if *A.* be bound to inclose against *B.*
who has twenty acres adjoining, and
A. purchases one acre contiguously
adjacent to the inclosure, *A.* shall
not be compelled to inclose. If *A.*
has a close which he used to inclose,
and afterwards has an acre of land
contiguously adjoining, and then lets
out his inclosure, with limits, &c.
Yet

he shall have a *distringas* in the place of a *petit cape*, &c. And if he make default at the day of the return of that writ, he shall have a writ to enquire of damages, and also a writ to distrain him to make the reparations, &c. And in this writ in his count he ought to shew the certainty of the land which the plaintiff hath adjoining unto the defendant, and the certainty of the land which the defendant hath there adjoining which he ought to enclose, and to alledge a prescription of the enclosure, &c. as appeareth in the count of the book of Entries, fol. 32. (a)

22 Ed. 4.
Issue 127.
10 Ed. 4. 7.
13 R. 2.
Cur' claud' 3.
29 H. 6.
38 Dyer.

Writ of Quo Jure.

F WHERE a man hath lands in fee, and another claimeth common in that land, he who owneth the land shall have this writ against that commoner who claimeth the common, and the writ is such :

7 H. 4. 12.
It is a good plea
to say, That he

hath nothing in the lands in which he claimeth common.

G *The king to the sheriff, &c. If A. shall make you secure, &c. then summon, &c. B. that he be, &c. to shew by what right he demands common of pasture in the land of him the said A. as the said A. hath no common in the land of him the said B. (a) neither doth the said B. service to him for which he ought to have common in the land of him the said A. as it is said: and have there, &c.*

H And this writ lieth for the lord of a town, or of a waste, or for any other tenant who claimeth common in his land; although he be not lord of the waste, or the town.

I And this writ is a writ of right in its nature, for when the plaintiff hath declared in this writ, the tenant

Yet he that has the land adjoining, shall not justify for default of inclosure. These points are resolved, 21 H. 6. 3. 22 H. 6. 8.

(a) So it is holden 22 H. 6. for if it be by indenture or composition he shall be put to his writ of covenant.

(a) Yet note; A lord may have common appendant to his demesnes in the lands of his tenant. 18 Ed. 3. 43.

shall

shall make defence and set out his title to the common, (b) and alledge seisin thereof, and the esplees, *and that such is his right he offers, &c.* as the demandant shall do in a writ of right; and then the plaintiff in the *quo jure* shall make defence, and deny the seisin alledged by the defendant, and join the mise, &c. upon the mere right, or by battel. See the count and the form of pleading in a *quo jure*, *Lib. Ent.* 96 and 80.

And in a *quo jure* brought by two, summons and sever-
ance lieth, and the nonsuit of the one shall not be the non-
suit of the other. And this *quo jure* lieth against several
tenants, as it appeareth, *H. 14 H. 3.* But in that case
they shall, it seemeth, make several defences, and make
several titles, and join the *mise* severally. And the view
shall be granted in this writ. And the process in this
writ is summons, attachment and distress, and after ap-
pearance if the defendant make default, a grand distress
shall issue out in the place of *petit cape*, &c.

Post. 133.

Writ de Rationabilibus Divisis.

THE writ *de rationabilibus divisis*, is in its nature
a writ of right; and lieth properly where two men
have lands in divers towns or hamlets, so that the one is
seised of the land in the one town or hamlet, and the
other of the land in the other town or hamlet by himself;
and they do not know the bounds of the towns or ham-
lets, which is the land of one, and which is the land of the
other; then to set the bounds in certain, this writ lieth
for the one against the other; and the form of the writ is
such:

*The king to the sheriff, &c. We command you, that justly
and without delay, you cause reasonable bounds to be set between
the land of A. of B. in C. and the land of D. of E. in F. as
there ought and have been used to be, whereupon be the said A.
complains, that the aforesaid D. draws more thereof to his fee
than belongs to him to have, &c. Witness, &c.*

(b) So that herein the defendant is held by some, that he shall not have
actor or prosecutor, and therefore it is aid on his title. 9 H. 6. 56.

And

O And this writ lieth for tenant in fee-simple, and against tenant for life, and in this writ the tenant for life shall have aid of him in the reversion, and they may join the mise in this writ, and it shall be tried by the grand assise, as other writs of right shall be. 12 Ed. 3.
24 Ed. 3.

P And this writ is *vicontiel*, and may be determined by the sheriff: for the plaintiff in this writ shall make his plaint before the sheriff in nature of a count, and upon the same the sheriff shall make a precept to warn the defendant, and when he cometh the plaintiff shall count, and the defendant shall answer the same in the count, &c. and if he deny it, then the sheriff shall make the division and partition of the land between them by certain metes and bounds.

Q But if the defendant will plead, and join the mise upon the mere right, and put himself upon the grand assise, then the plaintiff ought to remove the same by a *pone*, without cause, and the defendant may remove it with cause, as it is said in other writs. And the count in this writ is in this form: Sec 129. B.

R *And the same A. now comes and says, that whereas reasonable and right bounds ought to be between the land of the aforesaid N. &c. in S. and the land of him the said A. in B. the bounds aforesaid beginning towards the North in a certain place called K. and so directly towards the South in length by l. unto E. beyond which bounds the aforesaid N. &c. ought to have nothing towards the West, he the said N. &c. beyond the bounds aforesaid, hath drawn to his fee in S. of the land of him the said A. three hundred acres of moor and pasture, &c. whereof he the said A. says that one W. his late father, was seised of his demesne as of fee, by divers metes and bounds, in time of peace in the time of, &c. by taking the profits thereof to the value, &c. and that such is his right, he offers, &c. And the tenant may join the mise by battel or by grand assise, &c.*

A And divers tenants in common of a town or hamlet may have this action against him who is tenant of another town adjoining, and they shall count in one count, and shall make their several titles in that count, and shall alledge

alledge the esplees severally in the same count. Which see in the book of *Entries*, fol. 167.

And the defendant shall make his defence several against every one of them, or may wage battel, or join the mise at his pleasure, and then the plaintiffs shall reply thereunto and recite anew their count, and alledge the esplees, as before, and then join to the mise with the tenant upon the mere right, or by battel at the pleasure of the tenant. And if they do join the mise in the county before the sheriff, by battel, it shall be determined there, but not by the grand assise, &c. And it seemeth, that tenant in tail, or a parson of a church, or tenant for life shall not have this writ, for he who hath this writ ought to have an estate in fee, and summons and severance lie in this writ, and the view shall be granted in it. And jointenancy or coparcenary is a good plea in this writ, and the writ may be brought against several tenants, who have tenements in severalty or in common in the other town.

See 128. Q.

Writ ex Parte talis.

Note 13 R. 2. Fitz. Account 51. upon this writ of *ex parte talis*, the barons of the exchequer use to allow an averm. that the plaintiff in the writ hath paid the money by the commandment of the owner, or such special matter without writing or tally of the same.

THE writ of *ex parte talis* lieth where auditors are assigned unto a bailiff or receiver to account, and the auditors will not allow unto the bailiff or receiver his (a) reasonable allowances, which they ought to do, but commit him to prison; he who is so imprisoned shall have this writ *ex parte talis*, &c. But if a man brings a writ of account, and auditors are assigned unto him who is bailiff or receiver, to take his account, and they will not allow him his allowances as they ought to do, &c. he shall not have this writ of *ex parte talis*, nor any other remedy in that case, for he may shew the same to the justices, and they shall relieve him.

(a) Note; Payment to the plaintiff, or to another by his command, ought to be allowed, although the accountant has no tally or writing of the same. 13 R. 2. Account 51. *sed contr'* 6 R. 2. *ibid.* 47. per Belkn.

And

G And if a plea of account be sued in *London* against a receiver, &c. or in other court of record, and the party appear, and auditors are assigned him by the court, and they will not allow unto him such allowances as he thinketh they ought; he shall have a writ of *ex parte talis*; and the writ is such:

The king, &c. It is shewed unto us, on the behalf of A. (taken and detained in our prison of Lincoln for arrears of his account, in which B. affirms him to be bound to him for the time wherein he was his bailiff in N.) that the auditors of the said account deputed by him the said B. for that purpose, have unduly aggrieved him the said A. upon the same account, by charging him with receipts which he hath not received, or by not allowing to him reasonable expences and discharges to the great damage and grievance of him the said A. And because we will not that the said A. be injured in this behalf, we command you, that if the aforesaid A. by the testimony of the auditors of the accounts, shall be delivered, and shall find you sufficient bail to have him before our treasurer and barons in our exchequer to render to the aforesaid B. his account, according to the form of the statute thereof provided by the common council of our realm, then that you cause him the said A. to be delivered by the bail aforesaid out of the prison aforesaid, if he be detained in the same on that occasion, and no other; and give notice to the aforesaid B. that he be then there with the rolls and tallies, by which the aforesaid A. his account before rendered, to do and receive in the premisses what of right and according to the form of the statute aforesaid ought to be thereupon done: and have there the names of these bail and this writ. Witness, &c. Vide Stat. inde Westm. 2. cap. 11.

H And this writ shall be returnable before the treasurer and barons of the exchequer at a certain day, as it appeareth by the writ.

I And if a man have auditors assigned him in *London* by the party who taketh the account, and will not permit his tallies or other things to be allowed, but commit him to prison, and because he is a stranger in the city, he cannot find sureties to bail him to sue his writ of *ex parte talis*, &c. Then he may send unto the chancery, and put in

sureties before the king there, and thereupon he shall have a writ unto the sheriff of *London* out of the chancery, rehearsing the matter, and that he hath found sureties there, according to the statute, commanding the sheriff to deliver him out of prison; and the writ shall be such:

The king to the sheriff, &c. It is shewed unto us on the behalf of A. (as above, until) to the great damage and grievance of him the said A. And because the same A. is a foreigner in our city of London and unknown, wherefore he cannot find persons of the said city to be bail, to have him before our treasurer and barons of the exchequer to render his account aforesaid, and farther to do and receive that which our court shall consider in the premisses; and you have refused to admit other persons bail for him the said A. than of the city, and the same A. hath found sufficient bail before us in our chancery, to wit, C. D. and E. of the county of York, who have become bail to have him before our treasurer (or his deputy) and barons of the exchequer in fifteen days of Easter next coming, to review there his said account, and to stand to the right in the premisses, according to the form of the statute thereupon provided by the common council of our realm; we command you in the mean time, that you cause him the said A. to be delivered by the bail abovesaid out of the prison aforesaid, if he be detained in the same on that occasion, and no other: and give notice to the said B. that he be then there with the rolls and tallies by which the aforesaid A. his account before rendered as aforesaid, and to do and receive what shall be just and consonant to reason: and have there this writ, &c.

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And if he remain in prison, he may sue the *ex parte talis* A returnable before the treasurer and barons of the exchequer, and thereupon he may have another writ out of chancery directed unto the treasurer and barons of the exchequer, that they take sureties of him who is in prison according to the form of the statute; and that they deliver him out of prison. And he shall have another writ unto the gaoler, that he have his body before the treasurer and barons of the exchequer, and that he deliver the body when the treasurer and barons send him a writ so to do, &c. which writ appeareth in the Register.

(a) And

B (a) And if a man be committed to prison by auditors for arrearages of his account, and afterwards escape out of prison, the gaoler shall satisfy the party at whose suit he was committed, and the gaoler shall have a special action upon the case against the prisoner to answer the escape and the damages which the gaoler hath sustained; which writ is among the writs of *ex parte talis* in the Register; but it seems reasonable that the gaoler may take the party again, and so is the opinion of some books.

13 H. 7. 2.
V. 6 H. 7. 11.
& 12.
10 H. 7. 25.
13 Ed. 4. 9.
14 H. 7.
Statut. 32.

Writ of Execution upon a Statute-merchant.

C A Writ of execution upon a statute-merchant lieth in case, where a man is bounden in a statute-merchant before any mayor or bailiff of a corporate town, who have power to take such bonds or recognizances, to pay a certain sum of money at a day, at which day he doth not pay the same, then he to whom the obligation or recognizance is made, may come before the mayor, or him before whom the bond or recognizance was taken, and pray him to certify the same into the chancery under his seal, according to the statute of *Acton Burnel*; and if he will not certify the same as he ought to do, then the recognizee may have such writ directed unto the mayor:

But if a statute merchant be acknowledged to one who is absent, it shall not bind the commission, if it be not delivered to the commissary, as it seemeth by 20 Ed. 3. Fitz. Account 79.

The king to his beloved the mayor of Lincoln, and to T. clerk deputed to take recognizance of debts at L. greeting: it is shewed unto us on the behalf of I. that whereas R. in the tenth year of our reign, before W. late mayor of the city of Lincoln, and H. clerk deputed to take recognizances in the same city, acknowledged himself to owe to the aforesaid I. twenty-four pounds, according to the statute for merchants heretofore set forth at Acton Burnel, to be paid at certain times; and although the times of payment are long since past, and he the said I. hath often requested you, that you would certify us in our chancery of the recognizance aforesaid, according to the form of the statute

(a) And note, That in this case, lies against the bailiff. although an *ex parte talis* be sued by the party who escapes, yet the action

13 Ed. 3.

Barr. 253.

aforesaid,

aforesaid, and yet you have hitherto deferred, and still defer to certify us in our chancery aforesaid upon the recognizance aforesaid, whereupon we very much wonder; we command you, that having searched the rolls for such recognizance made before the said W. and H. in the year aforesaid, being in your custody, as it is said, if you shall find the said recognizance to have been made in form aforesaid, and the times of payment aforesaid to be past, and that we have not been otherwise certified thereof in our chancery, then that you certify us in our same chancery upon the recognizance aforesaid distinctly and openly, according to the statute aforesaid, under the seal there appointed for recognizances of merchants, that we may cause further to be done hereupon that which ought to be done, according to the form of the statute aforesaid.

And if he will not certify by this writ, he may sue an **D** alias and a pluries and attachment against the mayor and clerk; and it appeareth by this writ, that if an obligation be once certified in the chancery, it ought not to be certified again without affidavit made, that execution was not sued upon it, and then he shall have a special writ unto the mayor for it; for then it shall be taken as a several obligation upon every certificate.

And also it ought to be certified under the seal of him **E** who is deputed to seal the obligation. And if the mayor **F** do make his certificate unto the chancery, then the party shall have a writ to execute the statute, thus:

The king to the sheriff of Lincoln, greeting: because A. of B. before C. and C. clerks deputed to take recognizances of debts at L. or thus, before D. mayor; or thus, before L. lately mayor of our city of Lincoln, and F. clerk, or, then clerk deputed to take recognizances of debts at L. acknowledged himself to owe to E. ten pounds, which he ought to have paid to him at the feast of, &c. and hath not yet paid the same to him, as it is said; we command you, that you take the body of the aforesaid A. if he be a layman, and cause him to be kept safely in our prison, until he shall fully satisfy the said E. of the debt aforesaid, (or, shall fully satisfy the executor of the testament of the aforesaid E.) of the aforesaid ten pounds, and that you make known to us in what manner you shall have executed this our precept

precept on the octave of Saint Hilary, wheresoever, &c. by your letters sealed: and have, &c. (a).

G And this writ may be returned as well into the common
H pleas as king's bench. And if a man make a statute-
merchant of one hundred pounds payable at divers days,
if he fail of payment at any of the said days, the recognizee
shall sue execution at that day, and shall not stay his exe-
cution until all the days are past, as he shall do of an obli-
gation.

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6 Ed. 3. 29.

A (b) If a man be bound to pay twenty pounds at divers
days, he shall not have an action of debt upon the bond,
until all the days are past. But if he who is bounden in a
statute-merchant be a clerk or abbot, &c. then the writ
of execution is of another form, viz.

Contrary in
covenant; or if
he assent to pay,
by 5 Ma. 107.
32 H. 6. cont.
14 H. 8. 14.
Brudenell.

*The king, &c. Because A. parson of the church of B.
before, &c. We command you, that without delay you levy
the aforesaid ten pounds of the moveable goods and chattels of
him the said A. in your bailiwick, &c. and that you make
known to us in what manner, &c.*

For a clerk shall not be arrested by his body upon that
statute, and if process be awarded to arrest him, by that
statute he shall have a writ unto the sheriff, that he do not
trouble or molest him, and if he have arrested him for the
same, that he deliver him, if he know no cause why he
should not enjoy the privilege of a clerk: and in such writ
there is a proviso put in the end of it, thus:

*Provided, that if the aforesaid ten pounds have not been
levied upon the lands, goods and chattels of him the said A.
they may be levied, according to the form of the statute afore-
said, as is just, &c. Witness, &c.*

(a) And if on this writ the sheriff
returns the party dead, or *non est in-
ventus*, a writ shall issue to extend the
lands. But on a statute-staple certi-
fied, the conusee shall have the body,
goods and lands by one writ, 15 H.
7. 14. And note, by 29 Ed. 3. 1. it
appears, that the reprises of the land
(whereout the conusee had rent of
twenty pounds issuing) was of greater

value than the extent; and yet it was
intended that the lands were taken
and delivered, though it was impossi-
ble to levy the debt on that extent.
And note; the sheriff made a delivery
accordingly on the *liberate*; yet on
the return thereof judgment is ren-
dred, *Quod teneat quousq' levaverit, &c.*

(b) Post 167. 13 H. 4. F. Chan-
cery 140. per Hill.

(a) If a man be bounden in a statute-merchant in B
 twenty pounds, and the statute at the suit of the recogni-
 zee be certified in the chancery, and he afterwards die, his
 executors may have a special writ unto the mayor, reci-
 ting the certificate before them, commanding them to
 certify the same again into the chancery, and the writ is
 such :

*L. and W. executors of the testament of L. of B. have
 shewed unto us, that whereas R. &c. (as above) according to
 the form of the statute aforesaid : nevertheless you have not
 cared to do any thing thereupon, because that by your rolls you
 have found that our chancery hath been heretofore certified of
 the same recognizance : and the aforesaid executors appointed
 have personally asserted before us in our chancery, that no execu-
 tion of the recognizance aforesaid in any wise hath been done in
 the life of him the said L. or after his death, by virtue of the
 certificate thereof before made in chancery, and have besought us,
 that we will provide for them a remedy in this behalf : and be-
 cause we will help those executors as far as we justly can in this
 behalf, we command you, that having searched your rolls con-
 cerning such recognizance, if you shall find that recognizance to
 have been made in form aforesaid, and that the times of pay-
 ment are past, as it is said, then that you certify us in our chan-
 cery upon the recognizance aforesaid distinctly and openly, under
 your seals there appointed for recognizances of debts, as the
 custom is, notwithstanding our chancery is before certified there-
 of. Witness, &c.*

But this writ is not granted but upon affidavit and oath A
 made by the executors in chancery, or by him who would
 have this execution.

(a) So note ; Executors cannot pro- See *Dyer* 180. 17 *Ed.* 3. 31. 18
 ceed on the old certificate, viz. to *Ed.* 3. 10. 28 *Ed.* 3. 91. 25 *Ed.* 3.
 commence where the testator left off, 38. 36 *H.* 8. *Bro. Stat. Merch.* 43.
 but they must begin again *de novo.* 17 *Ed.* 3. 31. *in principio.*

(b) *Writ of Execution upon a Statute-staple.*

AND if a man be bounden before the mayor of the staple in a certain sum, to pay at a certain day, &c. and he do not pay it according to the statute; then he to whom the obligation is made shall come before the mayor and shew him the statute, and pray him to certify it under the seal into the chancery, as he shall do upon a statute-merchant. Or the mayor may award execution, if the party be dwelling within his jurisdiction, or have lands or goods there, &c. And if the mayor will not certify at the request of the party, then he shall have a writ out of the chancery unto the mayor to certify the same, as he shall have upon a statute-merchant shewed in chancery; and upon the same an *alias* and a *pluries*, and attachment against the mayor, if need be; and when the mayor hath certified the statute under the seal, then the writ of execution shall issue forth against the party to arrest him, and to extend his lands, &c. and this writ shall be always returnable in the chancery, and not in the king's bench or common pleas, as the writ which issueth forth to do execution upon a statute-merchant; and the form of the writ is such:

The king to the sheriff of Lincoln, greeting: because R. of W. on the 20th day of September in the year, &c. before E. of B. mayor of our staple of B. deputed to take recognizance of debts in the same staple, acknowledged himself to owe to W. of F. eight pounds, &c. which he ought to have paid to him on the feast of, &c. then, &c. And which he hath not yet paid to him, as it is said; we command you, that you take the body of the aforesaid R. if he be a layman, and keep him safely in our prison, until he shall fully satisfy the said W. of the debt aforesaid, and that you diligently cause to be extended and appraised, and seized into our hand, all the lands and chattels of him the

V. 45 Ed. 3.
22. Finchd.
Execution shall
be sued first of
the goods, and
then of the lands.
But 7 R. 2.
Execution 46.
the party hath
his election to
take one or the
other, and so is
the use at this
day.

(b) Note; Execution by a mayor of the staple, can be only within his jurisdiction.

Writ of Execution upon a Statute-staple.

said R. in your bailiwick, by the oath of honest and lawful men of the said bailiwick, whereby the truth of the matter may be better known, according to the true value thereof; and cause them to be delivered to the aforesaid W. until he shall be satisfied of the debt aforesaid, according to the form of the ordinance thereof made: and that in what manner you shall have executed this our precept, you make known to us in our chancery on the morrow of All Souls next coming, wheresoever we shall then be, &c. by your letters sealed: and have there this writ, &c.

And by this writ it appeareth, that the sheriff may arrest the conusor, and extend and take his lands, goods and chattels, and return the same extent in chancery, &c. And thereupon the conusee may sue a writ unto the sheriff out of the chancery to deliver him the lands and goods to the value of the debt; which writ is called *liberate*, and is such:

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The king to the sheriff, &c. Whereas R. of W. on the 20th day (as above, until) by your letters sealed; (and then thus :) and you have returned to us, that the aforesaid R. was not found in your bailiwick after our writ was delivered to you, but that you have taken into our hands all the lands and tenements and chattels of him the said R. in your said bailiwick, and have caused them to be extended and appraised according to the tenor of our said writ; to wit, two parts of one messuage, which are appraised at five pounds, &c. We command you, that you deliver to the same A. all the lands and tenements and chattels aforesaid by you so taken into our hands, if he will have them by the extent and appraisement aforesaid, to have them according to the form of the ordinance aforesaid, until he shall be satisfied of his debt aforesaid: and that in what manner you shall have executed this our precept, you make known to us in our chancery in fifteen days of Easter, wheresoever we shall then be, &c. by your letters, &c. And have, &c.

And if a man be bounden before the mayor of the staple, or in a statute-merchant before another mayor, &c. and have no lands but in *Durham*, or other county palatine, then upon the certificate of the statute made by the mayor, &c. upon the return of the sheriff, that he hath
not

not lands or tenements within his bailiwick, the party may surmise that he hath not any thing but in the county palatine, &c. and pray that the tenor of the record may be sent thither, to have execution done, and upon that surmise he shall have the following writ.

2 Ed. 4. 10.

Writ to do Execution in a County Palatine.

TH E king to the venerable father in Christ I. by the same grace bishop of Durham, or to his chancellor in the bishoprick aforesaid, greeting, &c. By the tenor of a certain statute of the staple, made before W. of W. lately mayor of the staple of Westminster, deputed to take recognizances of debts in the same staple, of forty pounds to T. of W. lately deceased, as it is said, and to E. of R. citizen of London, lately acknowledged by Agnes, who was the wife of H. of R. of the bishoprick of Durham, and sent into our chancery by N. B. now mayor of the said staple: we send to you inclosed in these presents, that having inspected the tenor aforesaid, you further cause execution of the recognizance aforesaid to be done at the prosecution of Catherine, who was the wife of the aforesaid T. I. F. and R. of L. executors of the testament of the aforesaid T. as of right and according to the law and custom of the kingdom of England ought to be done. *Witness, &c.*

B And if the statute be not sufficiently certified in the chancery by the mayor, &c. because he hath omitted any part of the bond, as the name or surname, or other matter material, then upon affidavit made, that he hath not had execution by reason of that certificate, he shall have a new writ unto the mayor and clerk, &c. to certify the statute fully again into the chancery, notwithstanding his certificate made before, and that writ appeareth in the Register.

If the mayor make a certificate of the statute into the chancery, and deliver the same unto the recognizee, and the party keep the certificate, and will not put it into the chancery; and afterwards another be made chancellor, the party ought to have a new certificate to that chan-

G g 3

cellor,

Note, 2 R. 3. 7. three several certificates were made upon one statute. But it cannot be intended that they were three several statutes. And note, That several writs were awarded upon them to several sheriffs.

cellor, otherwise he shall not have execution of the statute upon that certificate made to the old chancellor, which was not delivered in time into the chancery: and then he ought to sue a writ in chancery directed unto the mayor, to make a new certificate; and the writ shall be such:

The king to the mayor of the staple of Westminster deputed to take recognizances of debts in the same staple, greeting: It is shewed unto us, on the behalf of D. &c. that whereas W. of E. &c. in the third year of our reign, before you in the staple aforesaid, acknowledged himself to owe to the aforesaid D. forty pounds, to be paid at a certain time, according to the form of the statute-staple aforesaid; and although you have certified under the seal of your office, as the custom is, to R. bishop of London, lately our chancellor, while he continued in the office of chancellor, that the said time of payment is past, yet, because the aforesaid D. hath hitherto kept the said certificate in his own custody, and the aforesaid R. lately chancellor, to whom by name you before certified thereof, was long since and now is discharged from his office of chancellor; we will, and command you, that the said certificate, by you so made to the aforesaid late chancellor, being truly and wholly restored to you, and you having searched the rolls of such recognizances made before you in the year aforesaid, if you shall find that the recognizances aforesaid were made, then that without delay you certify to our chancellor that now is, in the same chancery, upon the recognizance aforesaid distinctly and openly, according to the form of the statute aforesaid, under the seal appointed for recognizance of the staple aforesaid, that we may further cause to be done hereupon that which, according to the statute aforesaid, should be done, the said certificate so before made notwithstanding. Witness, &c.

But note, That if in the first certificate he hath not expressed the proper name of the chancellor, then he may deliver that certificate to the new chancellor, and sue execution upon it, and therefore it is good to make the certificate general to the chancellor, &c. and without naming his name.

Recognizance in the County before the Sheriff.

E IF a man acknowledge in the county before the sheriff to pay to another a certain sum of money at a day certain, and do not pay it at the day, then the recognizee shall have writ out of the chancery unto the sheriff, commanding him to do execution upon this recognizance; and the writ shall be such :

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The king to the sheriff, &c. A. hath shewed unto us, that whereas he impleaded B. in your county by our writ, and he the same B. in that full county acknowledged himself to owe to the aforesaid A. certain money to be rendered at a certain time, you, notwithstanding that time is past, have not yet caused the same money to be paid to him the said A. upon his complaint according to his recognizance, to the great damage and grievance of him the said A. And because we are willing to relieve the same A. in this behalf as it shall be just, we command you, if it is so, that then you levy that money of the goods and chattels of him the said B. in your bailiwick, and cause the said A. to have the same without delay, that repeated complaints thereof may not be made to us. Witness, &c.

A But it seemeth that a recognizance shall be made when a plea is depending in the county before the sheriff by writ between the parties in debt, &c. but if there be not any plea depending in the county by writ, but by plaint, *quære* if the recognizance should be made; and it seemeth reasonable that it may be taken, as well when the plea of debt is depending in the county before the sheriff by plaint, as if it were by the king's writ.

Bro. Recog. 16.
Ant. 132.

But if a man come into the county before the sheriff, and there in court acknowledge to pay a certain sum of money unto another at a certain day, &c. where there is not any plaint or action depending betwixt the parties, whether this acknowledgement shall be good or not, *quære*. And it seems reasonable, that if it be under the sum of forty shillings, such acknowledgment should be good, and bind the party.

G g 4

And

Recognizance in the County before the Sheriff.

And if the party have a writ directed to the sheriff to do B
 execution of such recognizance (as before is said) and the
 sheriff will not do the same, then the recognizee may sue
 an *alias* and a *pluries*, and attachment against the sheriff;
 and the form of the writ is such :

*The king, &c. We have received information on the be-
 half of A. that whereas we lately commanded you, that if B.
 should acknowledge himself to owe to A. (so much) then you
 should distrain him the said B. to render the said debt to the
 same A. without delay; and although the said B. hath before
 you acknowledged himself to owe to the aforesaid A. the debt
 aforesaid, yet you have hitherto delayed, and still do delay to
 distrain him the said B. to render that debt, to the great damage
 and grievance of him the said A. And therefore we command
 you, if so it be, that you cause execution of the recognizance to
 be done without delay, according to the tenor of our command
 aforesaid, and that you in no wise omit this. Witness, &c.*

But it seemeth by this writ, that if the recognizer will
 not again acknowledge the debt before the sheriff, when
 he cometh to him to do execution, &c. but say that he
 hath paid the same, the sheriff ought not to do execu-
 tion.

And there is another writ in this form :

*The king to the sheriff, &c. We command you, that if A.
 hath acknowledged himself to owe to B. one hundred shillings,
 then distrain him the said A. to render the debt aforesaid to him
 the said B. &c.*

And he may have an *alias* and a *pluries*, and attachment
 upon the same, &c. And if the sheriff return upon the
alias, That he hath distrained the party by corn or other chat-
 tels, for which he hath not found buyers; then by the title of
 the Register shall be awarded a writ of *pluries reiterando*
 returnable, & *illud insuffic' reputand'*, &c. But *quære*
tamen of that; for it seemeth to be a good return: and
quære if the sheriff may sell the goods to pay the recogni-
 zance, for it seemeth by the Register he may sell the par-
 ty's goods.

And if a man be in execution upon a statute-merchant, C
 he ought to be found in prison for the rent and revenues
 of

of his lands which are in execution, &c. that is to say, with bread and water, as appeareth by the statute; and if he have not the same, he may sue a writ upon the statute directed to the mayor and sheriff, where he is in execution, that he have the livelihood which the statute giveth him; and the writ is such:

The king to the mayor and sheriffs of London, greeting: whereas it is contained in the statute made de mercatoribus, that merchants, for whose debts it shall happen that their debtors are arrested and imprisoned according to the form of the statute aforesaid, are bound to find for those debtors remaining in prison bread and water for their sustenance; we command you, that you cause to be done in this case to W. of S. arrested and detained in our prison for a debt to E. of K. by form of our statute aforesaid, as it is said, if he be detained in the same upon that and no other occasion, that which ought to be done, and in the like case hath been used to be done, according to the form of the statute aforesaid. Witnesses, &c. And upon that he may have an alias, pluries and attachment.

Writ de Perambulatione facienda.

Ant. 128.

D **W**HERE parties are in doubt of the bounds of their lordships, or of their towns; they by assent may sue this writ, directed unto the sheriff to make the perambulation, and to set the bounds and limits between them in certainty; and the writ is such:

E *The king to the sheriff, &c. We command you, that taking with you twelve discrete and lawful knights in your county, you go in your own person to the land of A. of B. in N. and the land of C. of D. in E. and by their oath cause to be made a perambulation between the land of him the said A. of B. in N. and the land of him the said C. of D. in E. so that the perambulation be made by certain metes and divisions; because the aforesaid A. and C. have put themselves before us upon that perambulation, and make known to our justices at Westminster, &c. (such a day) or to the justices at the next assise, &c. under your seal and the seals of four lawful knights of those who*
were

were present at that perambulation, by what metes and divisions that perambulation was made. And have there the names of the knights and this writ, &c.

[134]

19 Ed. 3. 58.

And the king may make his commission to other persons to make that perambulation, as well as to the sheriff, and to certify the same into the common pleas, or in the chancery, or elsewhere, &c. And such commission is oftentimes (a) granted to make perambulation of three or four counties where they are in doubt in the bounds and limits thereof, and this perambulation made by assent, shall bind all the parties and their heirs. A

But if there be tenant for life of a seignory, and another who is tenant in fee-simple of another seignory adjoining, sue forth such a writ or commission, by reason whereof a perambulation is made, it seemeth the same shall not bind him in reversion; neither shall the perambulation made with the assent of tenant in tail bind his heir. B

And the perambulation may be made for divers towns, and in divers counties, and the parties ought to come in person into the chancery, and there acknowledge and grant that a perambulation be made betwixt them, and the acknowledgment shall be enrolled in the chancery, and thereupon a commission or writ shall issue forth. And if the parties cannot come in chancery, then they ought to sue forth a writ of *dedimus potestatem* directed to certain persons, to take their acknowledgment, and to certify the same into the chancery under their seal, &c. and then upon that certificate returned into the chancery, this commission or writ may be granted, although the parties do not appear in person in chancery to pray the same. C

(a) Note; A division was made between the counties of C. and H. by an inquest taken of four counties by force of a commission; and resolved, 1. That if land lying in the town of A. but in truth within the county of C. be allotted to the county of H. that they shall still remain of the town

of A. as before. 2. That this shall not conclude any of the county of C. to suppose by writ or otherwise, that the lands are in the county of C. 3. If they are at issue on this point, it shall be tried by a *venue* of both counties. *Quære* 29 Ed. 3. 45.

Writ de Warrantia Chartæ.

Hob. 20.

D **T**HE writ of *warrantia chartæ* lieth properly where a man doth enfeoff another by deed, and bind him and his heirs to *warranty*, &c. Now if the defendant be impleaded in an assise, or in a writ of entry in the nature of an assise, in which actions he cannot vouch, then he shall have that writ against the feoffor or his heir, who made such warranty; and the writ is,

In a warran' chartæ, the defendant said, that he had a formedon pend-
ent of the land,
and no plea, and
that was against
the issue in tail.
Itin. North.

2 Ed. 3.

Garr. de

Charters 13. 2 Ed. 2. Ibid. 6.

E (a) *The king, &c. Command A. that justly, &c. he warrant to B. one messuage with the appurtenances in D. which he holds and claims to hold of him, and whereof he hath his charter, as it is said, &c. Or thus: The manor of N. with the appurtenances, and the advowson of the church of the same town, which he holds, &c. (as above) whereof he hath his charter, or the charter of D. his father, or mother, or other ancestor, whose heir he is, as it is said; and unless, &c.*

Two tenants in
common shall
join in this writ.

28 Ed. 3. 90.

So where three
are jointenants,
and a release to
the other two.

40 Ed. 3. 41,

42. 16 H. 7. 6,

7. If the de-
fendant tender a
plea to the plain-
tiff, and the
plaintiff will not

enter it; he shall not have advantage in this writ.

And although the writ suppose that he holdeth of the defendant, yet it is not material whether he hold of him or not.

(a) *Note*; This writ concerns the land, and therefore a fine may be levied thereon, 18 Ed. 4. 22. if it be brought in the county where the land is. 29 Ed. 3. 3. *per Kirt. Sed Stouff. cont.* Yet for that this writ is founded on the covenant, which is in a manner personal; although thereby the plaintiff ought to recover lands in value; it is in the party's own election to bring the writ in what county he pleases, and he need not bring it in the county where the lands lie; for

if he be impleaded thereof, he may well vouch in any county, 31 Ed. 3. *Garranty de Charters* 14. *per Thirn.* and so adjudged accordingly, and agreed by *Thirn, &c.* That if the lands, &c. in divers counties are passed by a deed or fine, he need not sue several writs, but one writ shall satisfy for all, 29 Ed. 3. 3, 4. but he ought to suppose in his count, that he is impleaded in each county. *Dyer* 221. *Quære.* See 12 H. 3. pl. 27. 24 Ed. 3. 35.

And

5 Eliz. Dyer
221. If the
warranty be only
against the gran-
tee and his heirs,
and there be not
dedi & concern
in the charter,
per curiam, the
writ lieth not.
12 H. 3. Garr.
de Charters 27.
One brought this

writ, unde chartam suam habet: the defendant said, non habet chartam suam, and the plaintiff
confessed the same, and said it was charta antecessoris sui; adjudged for the defendant.

Co. Lit. 384. b.
21 H. 6. 8.

Upon owelty of
services this writ
lieth; but that
is after seisin of
the services.

21 H. 6. 8.

Upon a feoffment
in fee with war-
ranty, he ought
in his count to
set forth the deed.

14 Ed. 3. 35.

acc.

And also if the plaintiff hold any land of the defendant **F**
by homage *auncest*, and have no charter thereof; (b) yet
he shall have this writ of *warr' chartæ* against the defen-
dant, and the writ shall say *unde chartam habet, &c.* and
yet he hath no deed to shew, but only the tenure by ho-
mage *auncestrel*, which implieth a warranty, and therefore
in that case, these words, *unde chartam habet, &c.* are not
material.

If a man have a lease of lands for life rendering certain **G**
rent, or maketh a gift in tail rendering rent without
deed, and afterwards the lessee or donee be impleaded in
such action where he cannot vouch, then he shall have this
writ of *warrantia chartæ* against the lessor or donor, or his
heir who hath the reversion: for the (c) reversion and rent
reserved, make a warranty in law by the statute of *Bigamis*,
cap. ult. although he have not any deed thereof.

(a) And if a man give lands to one in fee by deed by **H**
these words, *dedi, concessi, &c.* now he is bound to warrant
the lands to the feoffee by those words, and if the feoffee
be impleaded, he shall have a writ of *warrantia chartæ*
against the feoffor, by these words, *dedi, concessi, &c.* but
not against his heir, for the heir shall not be bounden unto
a warranty made by his father, unless he bind him and his

(b) See *Post.* 135. 24 Ed. 3. 35.
44 Ed. 3. pl. 18. 6 H. 7. 1, 11. and
note by 29 Ed. 3. 4. he *deraigned* the
warranty against the defendant, by
bringing a *scire facias* without shewing
the record.

(c) Note; Tenant by the curtesy
shall not vouch the heir to recover in
value; nor the lessee for life, him in
remainder, 14 H. 6. 25. and 10 H. 7.
10. a good case of voucher and re-
covery in value, *per cur'* a reversion
and rent without the words *dedi, &c.*
without deed, good to bind him in the
reversion to warranty, be it the lessor
or his grantee. 10 H. 7. 10. 34 Ed.

3. *Garranty* 30. 20 Ed. 3. *Coun-
terplea of Warranty* 7. But the vou-
chee there may disclaim if he be not
the lessor, &c. 10 H. 7. 10. So if
he be (not) lessor, grantee or heir.
17 Ed. 3. 39. 18 Ed. 3. 42. See
Co. Lit. 384. b.

(a) A. makes a lease for life by
dedi, and grants over the reversion;
yet the lessee may vouch A. 48 Ed.
3. 2. See 6 H. 7. 2. 14 H. 6. 25.
48 Ed. 3. 2. *Perk.* 26. and note; if
one warrants only against himself and
his heirs, warranty of charters does
not lie, *per cur'*, if it has not the word
dedi in the deed. *Dyer* 221.

heirs

heirs to warranty by exprefs words in the deed : as to say,
Ego & Hæred' mei omnia prædict' terras, &c. warrantiza-
bimus, &c.

I But note, That he shall not have the writ of *warrantia chartæ* against the feoffor, or against him against whom he hath the warranty, if he be impleaded in any action in which he may vouch him, for then he ought to vouch him to warranty ; and if he will not vouch him in the action, he shall not afterwards have a writ of *warrantia chartæ* (b) afterwards.

In a præcipe quod reddat, where the tenant hath a release or confirmation with warranty for doubt, the possession shall be counterpleaded, he shall have this writ. Wood

and Brian. 12 H. 7. 2.

K (c) And a man may sue forth this writ of *warrantia chartæ* before he be impleaded in any action, but yet the writ doth suppose that he is impleaded : and if the defendant appear, and say that he is not impleaded, by that plea he confesseth the warranty, and the plaintiff shall have judgment to recover his (d) warranty, so as if the defendant be after impleaded, and vouch him to warranty, and he enter into the warranty, and plead, and lose, by which the defendant recover in value, now the defendant shall have in value of the lands against the vouchee, which he had at the time of the purchase of his *warrantia chartæ*, and there-

21 H. 6. 41.
 22 H. 6. 22.
 30 H. 7. 7.

2 H. 4. 14. &
 12 H. 4. 13.
 he shall have in value the lands

which he had at the time of judgment, for the judgment makes them subject to the execution. 1 Ed. 3. 11. Fitz. Garr. de Charter 2. ac. 8 Ed. 2. Voucher 237. A man cannot vouch a clerk attaint, or a man outlawed ; but rather have *warrantia chartæ*. Contra of an idiot quod reddat. Quære if it be law at this day. Br. Warr. Chart. 29. 8 Ed. 4. 10. Markham acc. 24 Ed. 3. B. Warrant. Chart. 13. acc. 19 Ed. 3. Garr. Chart. 9. ac.

(b) See 18 Ed. 3. 42. *Garranty de Charters* 8. It is no plea here to say that the plaintiff is impleaded in such an action, wherein he may vouch, &c. though it is a good plea to say, that he was not tenant the day of the writ purchased ; yet in a *scire facias*, it is a good plea to say, that he was impleaded in such an action, wherein he might vouch, but did not, &c. and so by reason of his default he could not have execution. See accordant 9 Ed. 2. *Garranty de Charters* 30. that it is a good plea. *Vide infra* K. sed N. Br. 135. D. contra.

(c) And therefore the count is good, without shewing for what he is impleaded. 29 Ed. 3. 4. (post. 135. B.) See 7 H. 6. 17. a *scire facias* against a disseisor on a fine, and pending the writ the disseisee enters, he shall not have a warranty of charters, if no *scire facias* be sued against him. By Paston.

(d) But no damages. 18 Ed. 3. 42. 29 Ed. 3. 4. 31 Ed. 3. 22. See 2 H. 4. 14. contr. and 1 Ed. 6. 11. contra. See 16 Ed. 3. pl. 20. contra 9 Ed. 2. pl. 30.

[135]

fore it is good policy to bring his *warrantia chartæ* against him before he be sued, to bind the lands of the vouchee which he had at (a) that time. For if a man be vouched, he shall not render in value, but of the lands which he had at the time of the voucher, and if he have aliened the lands before the voucher, he shall render nothing in value; and therefore it is policy to bring his *warrantia chartæ* against him when he hath the land to render in value. and upon this writ and judgment the land shall be bound. But if a man recover his warranty by writ of *warrantia chartæ*, and have bounden the land which the vouchee had at that time; yet if he be afterwards impleaded for that land, for which he recovered his warranty, he ought to vouch him against whom he recovered his warranty, to defend the land, if he be sued in any action wherein he may vouch, otherwise he shall not have advantage by recovery of his warranty in the *warrantia chartæ* (b).

And if a man recover his warranty in a *warrantia A chartæ*, and afterwards be impleaded in an action in which he cannot vouch, as by assise, or by (c) *scire facias* sued forth upon a fine, &c. it seemeth he ought to give notice to him against whom he hath recovered his warranty

(a) *Viz.* At the time of the warranty *deraigned*, per *Hill.* 16 *Ed.* 3. *Garranty de Charters* 20. and per *Finchd.* If the defendant has not lands in value, the plaintiff shall recover damages. 29 *Ed.* 3. 3. *vide post.* 135. H.

But *note*; If the tenant vouch, and after the entry into the warranty the vouchee dies, and in a resummons against him he revouches the heir, and the heir loses all the land, which his ancestor had the day of the voucher, he shall be bound to render in value to the tenant, per *Wilby.* 18 *Ed.* 3. 17. and see the like per *Cur'* 22 *Ed.* 3. 3. But it is there held, That when he recovers in value in another county, than where the vouchee is summoned (except the te-

nements descend after the voucher) he shall not. 13 *Ed.* 3. *Recovery in value* 3. Yet see 4 *Ed.* 2. *Voucher* 248. *quod sic*, per *Chester* on a *testatum*, *quod Hill negavit.* See 29 *Ed.* 3. 4. 16 *Ed.* 3. pl. 20. 46 *Aff.* 51. 19 *Ed.* 3. pl. 9. 41 *Ed.* 3. pl. 22.

(b) See accordant 18 *Ed.* 3. 42. 19 *Ed.* 3. *Garranty de Charters* — that it is a good plea in a *scire facias* on a judgment in a *warrantia chartæ*, but not in the *warrantia chartæ* itself.

(c) It seems he ought to bring his *scire facias pendente placito.* 19 *Ed.* 3. *Garranty de Charters.* 11 *Ed.* 3. *ibid.* 22. But in the *scire facias* he ought to shew the first deed if the deed be not entered. 18 *Ed.* 3. 46. per *Thirn.* *vide* 8 *Ed.* 4. 1.

of

of the action, and to pray him to shew him what he shall plead in order to defend the land, &c. *Quære tamen* (d) thereof.

B If a man exchange lands with another by deed, if he be impleaded, he may vouch him with whom the exchange was made, by reason of that exchange; and also he shall have a writ of *warrantia chartæ* by that deed of exchange, although there are not words of warranty in the deed; and the vouchee shall have a writ of *warrantia chartæ*; *tamen quære* (e) of that.

23 H. 3.
Gar. Charters
26.

C And if a man be impleaded who is not tenant of the land, but pernor of the profits, he shall not have a writ of

D *warrantia chartæ*, because he can lose nothing. And a man shall have a writ of *warrantia chartæ* although he may vouch in the action brought against him, and if he do recover in the *warrantia chartæ*, and afterwards lose in the action brought against him, in which he hath vouched him against whom he recovered his warranty, then he shall have a writ which is called *Habere fac' ad valenc'* (a), &c. presently within the year after the recovery, and shall not sue forth *sci' fac'*. And an assignee shall have a writ of *warrantia chartæ*.

7 H. 4. 18.
17 Ed. 3. and
Br. War. c. 30.
None shall have
the writ but the
terre-tenant
24 Ed. 3. 25.
Willbye.
7 Ed. 4. 12.
3 Ed. 4. 7.
A good plea that
he had nothing
in the land jour
de brie purchase.
19 Ed. 3.
Car. c. 10.
4 Ed. 3.
Car. c. 12. ac.
for rent.service.

E (b) And a man shall have a writ of *warrantia chartæ* of land or rent which he demanded against him out of land, &c.

(d) And therefore the guarantor may maintain the guarantee in an assise brought against him, on the tenant's request. 11 H. 6. 41.

(e) *Videtur quod sic, per Thirn.* 17 Ed. 3. 44. *sed Hill and Shard contra*, because none shall have it but the tenant himself; yet see 18 Ed. 3. 19. *per Shard*, and 7 H. 4. 18. That a vouchee shall have a *warrantia chartæ* where he cannot vouch (over) 21 Ed. 3. 50. and by *Seaton*, the defendant in a *warrantia chartæ*, has no remedy to have his warranty over. See 31 Ed. 3. *Warranty of Charters* 22. *per Burton*, that a tenant by warranty shall have his warranty over. *Vide ant.*

124. F. 23 H. 6. pl. 26. 17 Ed. 2. 44. *contra*; *quære* 15 Ed. 3. pl. 25.

(a) So is 16 Ed. 3. *Garranty de Charters* 20. *contra* where he recovers before the writ brought against him; yet there he shall have a *scire facias*. 19 Ed. 3. *Warranty of Charters* 10. And it seems if the defendant does not acknowledge (or know) that he has lost, he shall have only a *scire facias*. 16 Ed. 3. *ibid.* 20. and 29 Ed. 3. 4. *per Tiff.* See 18 Ed. 3. 4. 2. 9 Ed. 2. pl. 2. 45 Ed. 3. 10. *Bro. Warranty* 20. 36 Ed. 3. pl. 11. 9 Ed. 2. pl. 30. 31 Ed. 3. pl. 22.

(b) So is 30 Ed. 2. 20. 31 Ed. 3. *Garranty*

Et c. but there he ought to vouch of land discharged of the rent, Et c. if he may vouch in the action.

(c) And a man may bring his writ of *warrantia chartæ* F in what county he pleaseth, if the deed bear not date in a certain place or county; for then he ought to bring the writ where the deed beareth date. But if a man bring a writ of *warrantia chartæ* by reason of homage *auncestrel*, Et c. then it ought to be brought in the county where the land lieth.

Ed. 1.
Voucher 266.
21 H. 6. 40.
Newton.
See Littl. III.
for the reason of
this case.

(d) And if a man infeoff another of lands by deed with G warranty, if the feoffee make a feoffment over, and take back an estate in fee, the warranty is determined, and he shall not have a writ of *warrantia chartæ*, because he is in of another estate. And so if A. disseise B. and infeoff C. (e) with warranty, who infeoffeth D. with warranty, upon whom a stranger entereth, in whose possession B. the disseisee releaseth his right, all the warranties are extinct, and if D. re-enter, and be impleaded, he shall not have a writ of *warrantia chartæ*, because he is in of another estate and by wrong. (f) But if a man be impleaded, for which

Garranty de Charters 20. per *Finchd.* but others *contra*, where the case was, A. enfeoffs B. with warranty, and B. recovers in a *warrantia chartæ*, on a general count of the land, and afterwards a rent is recovered against him; and he brings a *scire facias* on the general judgment in the *warrantia chartæ* to have the value of the rent; and per *Thirn.* he shall not have in value, seeing he never demanded warranty of the rent, but *Finchd.* and it seems the better opinions were *contra*.

(c) 4 Ed. 3. pl. 12.

(d) And see accordant per *Newton.* 22 H. 6. 22. *vide infra*.

(e) And see accordant 21 H. 6. 41.

(f) *Contra* per *June* and *Paston.* 14 H. 6. 26.

Note the case 21 H. 6. 41. *Warranty of Charters* per *Mills* versus H.

Clifford, and counts that one R. had arraigned an assise against him and the others, pending which writ, the plaintiff came to the defendant, and shewed that he was in by his feoffment with warranty, and prayed him to administer, i. e. to assist him with a plea to bar the demandant, which he refused; and then pleads, that long time before the defendant any thing had, A. and B. were seised, till disseised by C. who enfeoffed the defendant, who enfeoffed the plaintiff, as he had alledged, and A. died, and B. entered on the plaintiff. *Markham* demurred to this plea, for that it does not shew whether the entry was before, or pending, or after the assise, and 22 H. 6. 22. it was ruled by the court that it was no plea, if it does not shew the entry to be before the assise brought, or before the request made: for

which he purchaseth a writ of *warrantia chartæ* against him whom he hath a warranty against, and vouch him also in the action; and afterwards, depending the action, a stranger who hath ancients title enter upon him, yet that shall not abate his *warrantia chartæ* sued out before; *quod vide* 21 H. 6.

H (a) If a man be impleaded in assise, &c. and he bring a writ of *warrantia chartæ*, and count, that he is impleaded by assise, &c. and that he hath lost, &c. if the plaintiff recover his warranty, he shall recover his damages, and also to have in value of the land lost.

4 Ed. 2. Gar. Charters 29 it is but a personal action in the nature of a covenant, therefore he shall recover damages. 2 H. 6. 33. It is holden,

that in this case he shall recover damages only. But it seemeth by Br. Warr. Chart. 31. that if he hath no land to be recovered in value, that he shall not recover damages tantum, nor more than in voucher.

for if the entry was after judgment or request, the plaintiff is lawfully intitled to an action: for by *Newton*, the request is in nature of a voucher of a vouchee, so as to devolve the warranty (*contra* if it be after the entry into warranty) whereupon *A.* waived the said plea, and shewed that *B.* entered on the plaintiff before any request; and *Markham* demanded judgment, seeing that he acknowledges he was tenant at the time of the assise arraigned, and that the request was pending the assise; in which case suppose a stranger had entered by elder title, yet against him (law) the writ is good, as of the tenancy he had the day of the writ purchased; and by *Newton*, *Paston* and *Fulk*, it was now a good plea; for although he remained tenant to the demandant after the entry of *B.* yet he is not so against the defendant; wherefore they joined issue, if the entry was before the request. 22 H. 6. 22, 23. and *vide* 41. *ib.* so that it seems to me, that though the entry was after the request, yet if it was before the writ of warranty of charters purchased, the entry of the stranger would oust him of his warranty; for the request is not in lieu

of voucher, but only the writ of warranty of charters; and this is well proved, for that the lands which the vouchee has, are bound from the time of the voucher; but the lands of the tenant in the warranty of charters only from the time of the writ purchased; yet it seems clearly, that if in an assise the defendant requests his guarantor to give him a plea, and he refuses, and after judgment is given, &c. that so long as he continues tenant of the land he shall have a *warrantia chartæ*; but *contra* if he has not made any request, and according to this diversity are the books to be intended. *Register* 158. and 24 Ed. 3. 75. because till execution he continues tenant, and has his first warranty still on foot.

If a warranty be made to a man and his assigns, the assignee of the heir of the feoffee shall vouch as assignee. *Quod nota*, 7 Ed. 3. *Warranty*, &c. 44. 10 Ed. 3. 32. 19 Ed. 2. 85. 13 Ed. 1. 93.

(a) See accordant 4 Ed. 3. *Guaranty*, &c. 29 Ed. 3. *ibid.* 50. and *ant.* 134. *K. Bro. Garranty* 31. 15 Ed. 3. *pl.* 20. 4 Ed. 2. *pl.* 29.

And a man may sue forth divers writs of warranty of I
charters against divers men: and if he hath divers warran-
ties against them, he shall recover severally against them.

(b) And a man may sue a writ of *warrantia chartæ* at K
the common law for a warranty made of lands in ancient
demesne.

(a) And if a man have a writ of *warrantia chartæ* de- I
pending, although that the plaintiff who brought the action
against him who brought the *warrantia chartæ* be nonsuit
in his action, the same shall not abate the writ of *war-*
rantia chartæ although he hath not an action sued against
him for the land, &c.

Writ de Mesne (b).

18 H. 3. Mesne
78. adjudged that
the mesne ought
to acquit the te-
nant against all
lords paramount,
29 Ed. 3. 34. ac.
Note, that the
plaintiff in a
writ of mesne
needeth not in
the count to shew
the certainty of
the tenure be-
tween the mesne
and the lord pa-
ramount, but ge-
nerally to say,
that he holdeth
over, per 38 H.

THE writ of *mesne* lieth where there is lord, mesne and M
tenant, and each hold of the other by owelty of ser-
vices, as by homage, fealty and 20*l.* rent yearly; now if the
tenant paravail be distrained by the lord paramount for the
rent or service in arrear of the *mesne*, he shall have a writ of
mesne against his lord who is *mesne*, and by the writ he shall
recover his damages if he be distrained, otherwise not;
and by this writ he shall compel him to do the service, and
to pay the rents. And this writ may be sued in the N
county before the sheriff; and then the writ is, as follows,

(c) *The king to the sheriff, &c. We command you, that you
justice A. that justly, &c. he acquit B. of the services which*

6. 12. and 39 H. 6. 29. 13 Ed. 4. 6. If there be lord, mesne, and tenant, and the tenant is distrain-
ed by the lord, for which he bringeth a replevin, the lord avoweth upon a stranger; the tenant
may have a writ of mesne: yet the mesne cannot join because the avowry is made upon a stranger.

(b) See 16 Ed. 3. *Cause a remover*
15. Reg. 12. 30 Ed. 3. 13. and per
Skipw. the tenant shall have warranty
against the lord in the lord's own
court.

(a) *Infinite*; and therefore in a
writ against two, they may fourch per
distress in infinitum. 38 Ed. 3. 1. 9
Ed. 2. pl. 3. 41 Ed. 3. pl. 9.

(b) *Note*; The writ of mesne ought
to be brought in the county where

the lands lie, and if *nihil* be returned
against the lord, a writ shall issue to
another sheriff on a *testatum.* 29 Ed.
3. 3.

(c) *Note*; Though *A.* does not hold
of *C.* immediately, but only by a
mesnalty, yet the writ is good; ad-
judged; 29 Ed. 3. 34.—Also in
this writ the quantity of the services
are taken by protestation, and several
tenancy is a good plea. 2 H. 5. 2.

C.

C. requires from him for his freehold, which he holds of the aforesaid A. in I. and whereof he complains that he is distrained for his default, as he can reasonably shew, that he ought to acquit him, that we may hear no more clamour, &c.

And if it be sued in the common pleas, the writ is,

The king to the sheriff, &c. Command A. that justly, &c. he acquit B. of the service which we require from him for his freehold, &c. whereof he the said A. who is the mesne between us and the aforesaid B. ought to acquit him, and whereof he complains, that for his default he is distrained; and unless, &c. But this writ is where the king distraineth for services, &c.

And if another person be lord paramount, then the writ is, *that he acquit B. &c. which C. requires of him for his freehold, &c. whereof he the said A. who is the mesne between C. and the aforesaid B. ought to acquit him, &c.*

A And the writ of *mesne* may be sued and removed out of the county, at the suit of the plaintiff by a *pone* without cause, and at the suit of the defendant with cause shewed, as in a *replevin*.

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And a man may have an acquittal, and sue forth a writ of *mesne* upon it divers ways: one, if the *mesne* grant unto his tenant by his deed, upon the tenure made, to acquit him against his lord paramount, he shall have a writ of *mesne* upon that grant: another cause of acquittal is where he holdeth in frankalmoigne: and another cause is, where he holdeth in frank-marriage (a); or where he holdeth by the like service as the *mesne* holdeth over, which is called owelty (b).

14 Ed. 3.
Mesne 7. 38 H.
6. 12. 39 H. 6.
29. Priot.

(a) *Note*; The issue of the donee in the fourth degree shall not have a writ of *mesne*, as on a frank-marriage but as on a gift in tail. 12 H. 4. 9. W. W. See 38 H. 6. 12. 11 H. 4. 52. 46 Ed. 3. 31.

(b) Acquittal by owelty. See 22 Ed. 3. 3. he ought to shew seisin or tender of the services, whereof he is acquitted. 30 Ed. 3. 24. But in such case, the plaintiff ought to shew sei-

sin of the services in the *mesne*, either by himself, or his feoffor, &c. and this seisin is traversable. 18 Ed. 3. 19. 4 Ed. 2. *Mesne* 63. See 8 Ed. 3. 49. 5 Ed. 3. 56. 11 H. 4. 52. a good case of acquittal, that the *mesne* and his ancestors had acquitted the tenant and his ancestors, and all those whose estates he hath: adjudged 27 Ed. 3. 82.

And also a man may have an acquittal by prescription, D
as if he hold by homage *auncestral*.

And also by conuſance in a court of record to acquit him, &c. And the men of *Cornwall* claim to plead a plea in a writ of *mesne* in the county without writ, and that they have had allowance thereof in eyre. And although the writ of *mesne* be depending betwixt the *mesne* and the tenant paravail, yet the lord ſhall diſtrain the tenant paravail for the rents and ſervices, and ſhall not tarry until the writ of *mesne* be ended betwixt them, whether he ought to acquit the tenant or no.

7 H. 4. 12. Ant.
134. K. Br.
Mesne 22.

(c) And if a man bring a writ of *mesne* where he is not diſtrained, yet the writ is maintainable; but then he ſhall not recover damages: for the writ is brought only to recover the acquittal, &c. As if he bring a writ of warranty of charters where he is not impleaded, &c. he is to recover the warranty *pro loco & tempore*. E

4 H. 6. 25, 28.
4 Ed. 4. 35. 11
H. 4. 55. 10 H.
6. 26.

And if the tenant hold by the ſervices by which the *mesne* holdeth over, and alſo by other ſervices, it is a good owelty to have acquittal, becauſe it is ſuch, and more. And although the lord die depending the writ of *mesne*, yet the writ ſhall not abate (d). F

25 H. 6. Mesne
12. 17 Ed. 3. 19.
Br. Mesne 22.

(e) And tenant for term of life where the remainder is over in fee, ſhall have a writ of *mesne* againſt the *mesne*: but tenant for life ſhall not have a writ of *mesne* againſt him in the reverſion. But tenant in dower ſhall have a writ of *mesne* againſt him in the reverſion, becauſe ſhe hath her eſtate by the law. G

17 Ed. 3. 15.
contr. per
Thorp.

(a) And if the *mesne* have paid the ſervices unto the lord paramount, yet if the tenant be afterwards diſtrained H
for

(c) And therefore it ſeems, if the *mesne* pleads not diſtrained, the plaintiff ſhall recover the acquittal notwithstanding, yet it ſeems he ſhall not be amerced, if he comes (not) at the day. 30 Ed. 3. 22. 6 Ed. 4. 7. See 30 Ed. 3. 29, 30. 31 Ed. 3. Judgment 137. 14 Ed. 3. Ibid 158.

(d) And it was accordingly ſo adjudged in both points. 4 H. 6. 27. *Quere*, if there may be a good fore-

judger in ſuch caſe, 10 H. 6. 26. and it ſeemed to *Strange* that there ſhould, for the judgment is no other, but that the *mesne* ſhall be forejudged, and that the tenant ſhall be attendant *capitali domino*.

(e) See accordingly, but then he ought to count according to his caſe, See 13 Ed. 4. Mesne 12.

(a) Note: Though the ſervices of the *mesne* be not in arrear, yet a writ of
of

for those services, he shall have a writ of *mesne*. But it is a question whether he shall recover damages in that writ. But it seemeth he shall have damages, because the *mesne* shall recover damages against the lord, if he will put his cattle in the pound for the tenant, and sue a *replevin*, &c. and yet not distrained in his default is a good plea in a writ of *mesne*. And if he pay the services, he is not distrained in his default: for if the *mesne* grant unto the tenant to acquit him after the tenure made, he shall have a writ of *mesne* thereupon, as I conceive (b).

38 H. 6. 12. Pri-
sot. 50 Ed. 3. 23.
10 H. 6. 26. 34
H. 6. 47. 13 Ed.
4. 6. 7 H. 4. 18
18 Ed. 3. 19. 4
Ed. 3. 35. Bill-
ing. acc. 14 Ed.
3. Mesne. 12 Ed.
3. Mesne 12. 10
Ed. 3. 58. Ibid.
21. 8 Ed. 3. 26.
Mesne 19.

I And the husband and wife shall have a writ of *mesne* where they are distrained for the lands of the wife.

K (c) If the *mesne* grant the mesnalty for life, and the tenant attorn, the tenant shall not have a writ of *mesne* against the grantee for life. But tenant in tail shall have a writ

of *mesne* lies, because the tenant cannot plead *Rien arrear*. 39 Ed. 3. 34. *contra*. 17 Ed. 3. 15. See 39 Ed. 3. 19. 11 H. 4. 52.

(b) Note; A. is lord, B. *mesne*, C. *mesne*, and D. tenant, A. distrains B. for services, D. brings a writ of *mesne* against C. and recovers, C. brings a writ of *mesne* against B. and counts generally, B. pleads not distrained in his default, and the other replies *contra*, and the special matter is found *ut supra*, and that the services of B. were in arrear, but not the services of C. and it was held, 1. That without some such special mischief the tenant in service, *viz.* the *mesne* shall not have a writ of *mesne*. 2. That in the case of such mischief he shall have it, and so each *mesne* shall have it against the other, till it come to him in whom the default is. 39 Ed. 3. 3. 34. 39 H. 6. 31. 7 H. 4. 18. accordant. 3. That there ought to be a special count, 20 Ed. 3. *Mesne* 14. or at least a special replication, and that on the general issue found, this matter shall not aid him. 4. It seems

that the one *mesne* shall not recover damages of the other before execution, *ibid.* and 17 Ed. 3. 44. 18 Ed. 3. 19. Yet it seems, that notwithstanding the recovery against C. yet if B. had no notice of the distress, or if his services were not arrear, a writ of *mesne* does not lie against him by C. no more than it lies against C. without notice where his services were not in arrear. For in that case there is no default in him. See 7 H. 4. 18. Also, if the *mesne's* beasts are impounded for those of the tenant, he shall have a *replevin* of them, and so may each *mesne* have, &c. And if any *mesne* refuse to do so, *per Cur'*, the tenant shall have a writ of *mesne*. See 10 H. 6. 26. if the avowry be abateable, or if no services be due or arrear; yet if the *mesne* will not join with the tenant on request, a writ of *mesne* lies, for that the tenant being a stranger, shall not plead in abatement of the avowry.

(c) See 40 Ed. 3. 7. 12 Ed. 3. *Mesne* 11. *contra*.

5 Eliz. Dyer
221. If the
warranty be only
against the gran-
tee and his heirs,
and there be not
dedi & concern
in the charter,
per curiam, the
writ lieth not.
12 H. 3. Garr.
de Charters 27.
One brought this

writ, unde chartam suam habet: the defendant said, non habet chartam suam, and the plaintiff
confessed the same, and said it was charta antecessoris sui; adjudged for the defendant.

Co. Lit. 384. b.
21 H. 6. 8.
Upon owelty of
services this writ
lieth; but that
is after seisin of
the services.
21 H. 6. 8.
Upon a feoffment
in fee with war-
ranty, he ought
in his count to
set forth the deed.
14 Ed. 3. 35.
acc.

And also if the plaintiff hold any land of the defendant **F**
by homage *auncest*, and have no charter thereof; (b) yet
he shall have this writ of *warr' chartæ* against the defen-
dant, and the writ shall say *unde chartam habet, &c.* and
yet he hath no deed to shew, but only the tenure by ho-
mage *auncestrel*, which implieth a warranty, and therefore
in that case, these words, *unde chartam habet, &c.* are not
material.

If a man have a lease of lands for life rendering certain **G**
rent, or maketh a gift in tail rendering rent without
deed, and afterwards the lessee or donee be impleaded in
such action where he cannot vouch, then he shall have this
writ of *warrantia chartæ* against the lessor or donor, or his
heir who hath the reversion: for the (c) reversion and rent
reserved, make a warranty in law by the statute of *Bigamis*,
cap. ult. although he have not any deed thereof.

(a) And if a man give lands to one in fee by deed by **H**
these words, *dedi, concessi, &c.* now he is bound to warrant
the lands to the feoffee by those words, and if the feoffee
be impleaded, he shall have a writ of *warrantia chartæ*
against the feoffor, by these words, *dedi, concessi, &c.* but
not against his heir, for the heir shall not be bounden unto
a warranty made by his father, unless he bind him and his

(b) See *Post.* 135. 24 Ed. 3. 35.
44 Ed. 3. pl. 18. 6 H. 7. 1, 11. and
note by 29 Ed. 3. 4. he *deraigned* the
warranty against the defendant, by
bringing a *scire facias* without shewing
the record.

(c) Note; Tenant by the curtesy
shall not vouch the heir to recover in
value; nor the lessee for life, him in
remainder, 14 H. 6. 25. and 10 H. 7.
10. a good case of voucher and re-
covery in value, *per cur'* a reversion
and rent without the words *dedi, &c.*
without deed, good to bind him in the
reversion to warranty, be it the lessor
or his grantee. 10 H. 7. 10. 34 Ed.

3. *Garranty* 30. 20 Ed. 3. *Coun-
terplea of Warranty* 7. But the vou-
chee there may disclaim if he be not
the lessor, &c. 10 H. 7. 10. So if
he be (not) lessor, grantee or heir.
17 Ed. 3. 39. 18 Ed. 3. 42. See
Co. Lit. 384. b.

(a) A. makes a lease for life by
dedi, and grants over the reversion;
yet the lessee may vouch A. 48 Ed.
3. 2. See 6 H. 7. 2. 14 H. 6. 25.
48 Ed. 3. 2. *Perk.* 26. and note; if
one warrants only against himself and
his heirs, warranty of charters does
not lie, *per cur'*, if it has not the word
dedi in the deed. *Dyer* 221.

heirs

heirs to warranty by exprefs words in the deed : as to say, *Ego & Hæred' mei omnia prædict' terras, &c. warrantizabimus, &c.*

I But note, That he shall not have the writ of *warrantia chartæ* against the feoffor, or against him against whom he hath the warranty, if he be impleaded in any action in which he may vouch him, for then he ought to vouch him to warranty ; and if he will not vouch him in the action, he shall not afterwards have a writ of *warrantia chartæ* (b) afterwards.

In a præcipe quod reddat, where the tenant hath a release or confirmation with warranty for doubt, the possession shall be counterpleaded, he shall have this writ. Wood

and Brian. 12 H. 7. 2.

K (c) And a man may sue forth this writ of *warrantia chartæ* before he be impleaded in any action, but yet the writ doth suppose that he is impleaded : and if the defendant appear, and say that he is not impleaded, by that plea he confesseth the warranty, and the plaintiff shall have judgment to recover his (d) warranty, so as if the defendant be after impleaded, and vouch him to warranty, and he enter into the warranty, and plead, and lose, by which the defendant recover in value, now the defendant shall have in value of the lands against the vouchee, which he had at the time of the purchase of his *warrantia chartæ*, and there-

21 H. 6. 41.
22 H. 6. 22.
30 H. 7. 7.

2 H. 4. 14. &
12 H. 4. 13.
he shall have in value the lands

which he had at the time of judgment, for the judgment makes them subject to the execution. 1 Ed. 3. 11. Fitz. Garr. de Charter 2. ac. 8 Ed. 2. Voucher 237. A man cannot vouch a clerk attaint, or a man outlawed ; but rather have *warrantia chartæ*. Contra of an ideot quod reddat. Quære if it be law at this day. Br. Warr. Chart. 29. 8 Ed. 4. 10. Markham acc. 24 Ed. 3. B. Warrant. Chart. 13. acc. 19 Ed. 3. Garr. Chart. 9. ac.

(b) See 18 Ed. 3. 42. *Garranty de Charters* 8. It is no plea here to say that the plaintiff is impleaded in such an action, wherein he may vouch, &c. though it is a good plea to say, that he was not tenant the day of the writ purchased ; yet in a *scire facias*, it is a good plea to say, that he was impleaded in such an action, wherein he might vouch, but did not, &c. and so by reason of his default he could not have execution. See accordant 9 Ed. 2. *Garranty de Charters* 30. that it is a good plea. *Vide infra* K. sed N. Br. 135. D. contra.

(c) And therefore the count is good, without shewing for what he is impleaded. 29 Ed. 3. 4. (post. 135. B.) See 7 H. 6. 17. a *scire facias* against a disseisor on a fine, and pending the writ the disseisee enters, he shall not have a warranty of charters, if no *scire facias* be sued against him. By Paston.

(d) But no damages. 18 Ed. 3. 42. 29 Ed. 3. 4. 31 Ed. 3. 22. See 2 H. 4. 14. contr. and 1 Ed. 6. 11. contra. See 16 Ed. 3. pl. 20. contra 9 Ed. 2. pl. 30.

[135]

fore it is good policy to bring his *warrantia chartæ* against him before he be sued, to bind the lands of the vouchee which he had at (a) that time. For if a man be vouched, he shall not render in value, but of the lands which he had at the time of the voucher, and if he have aliened the lands before the voucher, he shall render nothing in value; and therefore it is policy to bring his *warrantia chartæ* against him when he hath the land to render in value. and upon this writ and judgment the land shall be bound. But if a man recover his warranty by writ of *warrantia chartæ*, and have bounden the land which the vouchee had at that time; yet if he be afterwards impleaded for that land, for which he recovered his warranty, he ought to vouch him against whom he recovered his warranty, to defend the land, if he be sued in any action wherein he may vouch, otherwise he shall not have advantage by recovery of his warranty in the *warrantia chartæ* (b).

And if a man recover his warranty in a *warrantia A chartæ*, and afterwards be impleaded in an action in which he cannot vouch, as by assise, or by (c) *scire facias* sued forth upon a fine, &c. it seemeth he ought to give notice to him against whom he hath recovered his warranty

(a) *Viz.* At the time of the warranty *deraigned*, per *Hill.* 16 *Ed.* 3. *Garranty de Charters* 20. and per *Finchd.* If the defendant has not lands in value, the plaintiff shall recover damages. 29 *Ed.* 3. 3. *vide post.* 135. H.

But *note*; If the tenant vouch, and after the entry into the warranty the vouchee dies, and in a resummons against him he revouches the heir, and the heir loses all the land, which his ancestor had the day of the voucher, he shall be bound to render in value to the tenant, per *Wilby.* 18 *Ed.* 3. 17. and see the like per *Cur'* 22 *Ed.* 3. 3. But it is there held, That when he recovers in value in another county, than where the vouchee is summoned (except the te-

nements descend after the voucher) he shall not. 13 *Ed.* 3. *Recovery in value* 3. Yet see 4 *Ed.* 2. *Voucher* 248. *quod sic*, per *Chester* on a *testatum*, *quod Hill negavit.* See 29 *Ed.* 3. 4. 16 *Ed.* 3. pl. 20. 46 *Aff.* 51. 19 *Ed.* 3. pl. 9. 41 *Ed.* 3. pl. 22.

(b) See accordant 18 *Ed.* 3. 42. 19 *Ed.* 3. *Garranty de Charters* — that it is a good plea in a *scire facias* on a judgment in a *warrantia chartæ*, but not in the *warrantia chartæ* itself.

(c) It seems he ought to bring his *scire facias pendente placito.* 19 *Ed.* 3. *Garranty de Charters.* 11 *Ed.* 3. *ibid.* 22. But in the *scire facias* he ought to shew the first deed if the deed be not entered. 18 *Ed.* 3. 46. per *Thirn.* *vide* 8 *Ed.* 4. 1.

of

of the action, and to pray him to shew him what he shall plead in order to defend the land, &c. *Quære tamen* (d) thereof.

B If a man exchange lands with another by deed, if he be impleaded, he may vouch him with whom the exchange was made, by reason of that exchange; and also he shall have a writ of *warrantia chartæ* by that deed of exchange, although there are not words of warranty in the deed; and the vouchee shall have a writ of *warrantia chartæ*; *tamen quære* (e) of that.

23 H. 3.
Gar. Charters
26.

C And if a man be impleaded who is not tenant of the land, but pernor of the profits, he shall not have a writ of
D *warrantia chartæ*, because he can lose nothing. And a man shall have a writ of *warrantia chartæ* although he may vouch in the action brought against him, and if he do recover in the *warrantia chartæ*, and afterwards lose in the action brought against him, in which he hath vouched him against whom he recovered his warranty, then he shall have a writ which is called *Habere fac' ad valenc'* (a), &c. presently within the year after the recovery, and shall not sue forth *sci' fac'*. And an assignee shall have a writ of *warrantia chartæ*.

7 H. 4. 18.
17 Ed. 3. and
Br. War. c. 30.
None shall have
the writ but the
terre-tenant
24 Ed. 3. 25.
Willbye.
7 Ed. 4. 12.
3 Ed. 4. 7.
A good plea that
he had nothing
in the land jour
de brie purchase.
19 Ed. 3.
Car. c. 10.
4 Ed. 3.
Car. c. 12. ac.
for rent-service.

E (b) And a man shall have a writ of *warrantia chartæ* of land or rent which he demanded against him out of land, &c.

(d) And therefore the guarrantor may maintain the guarantee in an assise brought against him, on the tenant's request. 11 H. 6. 41.

(e) *Videtur quod sic, per Thirn.* 17 Ed. 3. 44. *sed Hill and Shard contra*, because none shall have it but the tenant himself; yet see 18 Ed. 3. 19. *per Shard*, and 7 H. 4. 18. That a vouchee shall have a *warrantia chartæ* where he cannot vouch (over) 21 Ed. 3. 50. and by *Seaton*, the defendant in a *warrantia chartæ*, has no remedy to have his warranty over. See 31 Ed. 3. *Warranty of Charters* 22. *per Burton*, that a tenant by warranty shall have his warranty over. *Vide ant.*

124. F. 23 H. 6. pl. 26. 17 Ed. 2. 44. *contra*; *quære* 15 Ed. 3. pl. 25.

(a) So is 16 Ed. 3. *Garranty de Charters* 20. *contra* where he recovers before the writ brought against him; yet there he shall have a *scire facias*. 19 Ed. 3. *Warranty of Charters* 10. And it seems if the defendant does not acknowledge (or know) that he has lost, he shall have only a *scire facias*. 16 Ed. 3. *ibid.* 20. and 29 Ed. 3. 4. *per Tiff.* See 18 Ed. 3. 4. 2. 9 Ed. 2. pl. 2. 45 Ed. 3. 10. *Bro. Warranty* 20. 36 Ed. 3. pl. 11. 9 Ed. 2. pl. 30. 31 Ed. 3. pl. 22.

(b) So is 30 Ed. 2. 20. 31 Ed. 3. *Garranty*

Et c. but there he ought to vouch of land discharged of the rent, Et c. if he may vouch in the action.

(c) And a man may bring his writ of *warrantia chartæ* F in what county he pleaseth, if the deed bear not date in a certain place or county; for then he ought to bring the writ where the deed beareth date. But if a man bring a writ of *warrantia chartæ* by reason of homage *auncestrel*, Et c. then it ought to be brought in the county where the land lieth.

Ed. 1.
Voucher 266.
21 H. 6. 40.
Newton.
See Littl. III.
for the reason of
this case.

(d) And if a man infeoff another of lands by deed with G warranty, if the feoffee make a feoffment over, and take back an estate in fee, the warranty is determined, and he shall not have a writ of *warrantia chartæ*, because he is in of another estate. And so if A. disseise B. and infeoff C. (e) with warranty, who infeoffeth D. with warranty, upon whom a stranger entereth, in whose possession B. the disseisee releaseth his right, all the warranties are extinct, and if D. re-enter, and be impleaded, he shall not have a writ of *warrantia chartæ*, because he is in of another estate and by wrong. (f) But if a man be impleaded, for which

Garranty de Charters 20. per *Finchd.* but others *contra*, where the case was, A. enfeoffs B. with warranty, and B. recovers in a *warrantia chartæ*, on a general count of the land, and afterwards a rent is recovered against him; and he brings a *scire facias* on the general judgment in the *warrantia chartæ* to have the value of the rent; and per *Thirn.* he shall not have in value, seeing he never demanded warranty of the rent, but *Finchd.* and it seems the better opinions were *contra*.

(c) 4 Ed. 3. pl. 12.

(d) And see accordant per *Newton.* 22 H. 6. 22. *vide infra*.

(e) And see accordant 21 H. 6. 41.

(f) *Contra* per *June* and *Paston.* 14 H. 6. 26.

Note the case 21 H. 6. 41. *Warranty of Charters* per *Mills* versus H.

Clifford, and counts that one R. had arraigned an assise against him and the others, pending which writ, the plaintiff came to the defendant, and shewed that he was in by his feoffment with warranty, and prayed him to administer, i. e. to assist him with a plea to bar the demandant, which he refused; and then pleads, that long time before the defendant any thing had, A. and B. were seised, till disseised by C. who enfeoffed the defendant, who enfeoffed the plaintiff, as he had alledged, and A. died, and B. entered on the plaintiff. *Markham* demurred to this plea, for that it does not shew whether the entry was before, or pending, or after the assise, and 22 H. 6. 22. it was ruled by the court that it was no plea, if it does not shew the entry to be before the assise brought, or before the request made: for

which he purchaseth a writ of *warrantia chartæ* against him whom he hath a warranty against, and vouch him also in the action; and afterwards, depending the action, a stranger who hath ancients title enter upon him, yet that shall not abate his *warrantia chartæ* sued out before; *quod vide* 21 H. 6.

H (a) If a man be impleaded in assise, &c. and he bring a writ of *warrantia chartæ*, and count, that he is impleaded by assise, &c. and that he hath lost, &c. if the plaintiff recover his warranty, he shall recover his damages, and also to have in value of the land lost.

4 Ed. 2. Gar. Charters 29 it is but a personal action in the nature of a covenant, therefore he shall recover damages. 2 H. 6. 33. It is holden,

that in this case he shall recover damages only. But it seemeth by Br. Warr. Chart. 31. that if he hath no land to be recovered in value, that he shall not recover damages tantum, nor more than in voucher.

for if the entry was after judgment or request, the plaintiff is lawfully intitled to an action: for by *Newton*, the request is in nature of a voucher of a vouchee, so as to devolve the warranty (*contra* if it be after the entry into warranty) whereupon *A.* waived the said plea, and shewed that *B.* entered on the plaintiff before any request; and *Markham* demanded judgment, seeing that he acknowledges he was tenant at the time of the assise arraigned, and that the request was pending the assise; in which case suppose a stranger had entered by elder title, yet against him (law) the writ is good, as of the tenancy he had the day of the writ purchased; and by *Newton*, *Paston* and *Fulk*, it was now a good plea; for although he remained tenant to the demandant after the entry of *B.* yet he is not so against the defendant; wherefore they joined issue, if the entry was before the request. 22 H. 6. 22, 23. and *vide* 41. *ib.* so that it seems to me, that though the entry was after the request, yet if it was before the writ of warranty of charters purchased, the entry of the stranger would oust him of his warranty; for the request is not in lieu

of voucher, but only the writ of warranty of charters; and this is well proved, for that the lands which the vouchee has, are bound from the time of the voucher; but the lands of the tenant in the warranty of charters only from the time of the writ purchased; yet it seems clearly, that if in an assise the defendant requests his guarantor to give him a plea, and he refuses, and after judgment is given, &c. that so long as he continues tenant of the land he shall have a *warrantia chartæ*; but *contra* if he has not made any request, and according to this diversity are the books to be intended. *Register* 158. and 24 Ed. 3. 75. because till execution he continues tenant, and has his first warranty still on foot.

If a warranty be made to a man and his assigns, the assignee of the heir of the feoffee shall vouch as assignee. *Quod nota*, 7 Ed. 3. *Warranty*, &c. 44. 10 Ed. 3. 32. 19 Ed. 2. 85. 13 Ed. 1. 93.

(a) See accordant 4 Ed. 3. *Guaranty*, &c. 29 Ed. 3. *ibid.* 50. and *ant.* 134. K. Bro. *Guaranty* 31. 15 Ed. 3. pl. 20. 4 Ed. 2. pl. 29.

And a man may sue forth divers writs of warranty of I
charters against divers men: and if he hath divers warran-
ties against them, he shall recover severally against them.

(b) And a man may sue a writ of *warrantia chartæ* at K
the common law for a warranty made of lands in ancient
demesne.

(a) And if a man have a writ of *warrantia chartæ* de- L
pending, although that the plaintiff who brought the action
against him who brought the *warrantia chartæ* be nonsuit
in his action, the same shall not abate the writ of *war-
rantia chartæ* although he hath not an action sued against
him for the land, &c.

Writ de Mesne (b).

18 H. 3. Mesne
78. adjudged that
the mesne ought
to acquit the te-
nant against all
lords paramount,
29 Ed. 3. 34. ac.
Note, that the
plaintiff in a
writ of mesne
needeth not in
the count to shew
the certainty of
the tenure be-
tween the mesne
and the lord pa-
ramount, but ge-
nerally to say,
that he holdeth
over, per 38 H.

THE writ of *mesne* lieth where there is lord, mesne and M
tenant, and each hold of the other by owelty of ser-
vices, as by homage, fealty and 20*l.* rent yearly; now if the
tenant paravail be distrained by the lord paramount for the
rent or service in arrear of the *mesne*, he shall have a writ of
mesne against his lord who is *mesne*, and by the writ he shall
recover his damages if he be distrained, otherwise not;
and by this writ he shall compel him to do the service, and
to pay the rents. And this writ may be sued in the N
county before the sheriff; and then the writ is, as follows,

(c) *The king to the sheriff, &c. We command you, that you
justice A. that justly, &c. he acquit B. of the services which*

6. 12. and 39 H. 6. 29. 13 Ed. 4. 6. If there be lord, mesne, and tenant, and the tenant is distrain-
ed by the lord, for which he bringeth a replevin, the lord avoweth upon a stranger; the tenant
may have a writ of mesne: yet the mesne cannot join because the avowry is made upon a stranger.

(b) See 16 Ed. 3. *Cause a remover*
15. Reg. 12. 30 Ed. 3. 13. and per
Skipw. the tenant shall have warranty
against the lord in the lord's own
court.

(a) *Infinite*; and therefore in a
writ against two, they may fourch per
distress in infinitum. 38 Ed. 3. 1. 9
Ed. 2. pl. 3. 41 Ed. 3. pl. 9.

(b) Note; The writ of mesne ought
to be brought in the county where

the lands lie, and if *nihil* be returned
against the lord, a writ shall issue to
another sheriff on a *testatum*. 29 Ed.
3. 3.

(c) Note; Though *A.* does not hold
of *C.* immediately, but only by a
mesnalty, yet the writ is good; ad-
judged; 29 Ed. 3. 34.—Also in
this writ the quantity of the services
are taken by protestation, and several
tenancy is a good plea. 2 H. 5. 2.

C.

C. requires from him for his freehold, which he holds of the aforesaid A. in I. and whereof he complains that he is distrained for his default, as he can reasonably shew, that he ought to acquit him, that we may hear no more clamour, &c.

And if it be sued in the common pleas, the writ is,

The king to the sheriff, &c. Command A. that justly, &c. he acquit B. of the service which we require from him for his freehold, &c. whereof he the said A. who is the mesne between us and the aforesaid B. ought to acquit him, and whereof he complains, that for his default he is distrained; and unless, &c. But this writ is where the king distraineth for services, &c.

And if another person be lord paramount, then the writ is, *that he acquit B. &c. which C. requires of him for his freehold, &c. whereof he the said A. who is the mesne between C. and the aforesaid B. ought to acquit him, &c.*

A And the writ of *mesne* may be sued and removed out of the county, at the suit of the plaintiff by a *pone* without cause, and at the suit of the defendant with cause shewed, as in a *replevin*.

[136]

B And a man may have an acquittal, and sue forth a writ of *mesne* upon it divers ways: one, if the *mesne* grant unto his tenant by his deed, upon the tenure made, to acquit him against his lord paramount, he shall have a writ of *mesne* upon that grant: another cause of acquittal is where he holdeth in frankalmoigne: and another cause is, where he holdeth in frank-marriage (a); or where he holdeth by the like service as the *mesne* holdeth over, which is called owelty (b).

14 Ed. 3.
Mesne 7. 38 H.
6. 12. 39 H. 6.
29. Priot.

(a) *Note*; The issue of the donee in the fourth degree shall not have a writ of *mesne*, as on a frank-marriage but as on a gift in tail. 12 H. 4. 9. W. W. See 38 H. 6. 12. 11 H. 4. 52. 46 Ed. 3. 31.

(b) Acquittal by owelty. See 22 Ed. 3. 3. he ought to shew seisin or tender of the services, whereof he is acquitted. 30 Ed. 3. 24. But in such case, the plaintiff ought to shew sei-

sin of the services in the *mesne*, either by himself, or his feoffor, &c. and this seisin is traversable. 18 Ed. 3. 19. 4 Ed. 2. *Mesne* 63. See 8 Ed. 3. 49. 5 Ed. 3. 56. 11 H. 4. 52. a good case of acquittal, that the *mesne* and his ancestors had acquitted the tenant and his ancestors, and all those whose estates he hath: adjudged 27 Ed. 3. 82.

H h 2

And

And also a man may have an acquittal by prescription, D
as if he hold by homage *auncestrel*.

And also by conusance in a court of record to acquit him, &c. And the men of *Cornwall* claim to plead a plea in a writ of *mesne* in the county without writ, and that they have had allowance thereof in eyre. And although the writ of *mesne* be depending betwixt the *mesne* and the tenant paravail, yet the lord shall distrain the tenant paravail for the rents and services, and shall not tarry until the writ of *mesne* be ended betwixt them, whether he ought to acquit the tenant or no.

7 H. 4. 12. Ant.
134. K. Br.
Mesne 22.

(c) And if a man bring a writ of *mesne* where he is not E
distrained, yet the writ is maintainable; but then he shall not recover damages: for the writ is brought only to recover the acquittal, &c. As if he bring a writ of warranty of charters where he is not impleaded, &c. he is to recover the warranty *pro loco & tempore*.

4 H. 6. 25, 28.
4 Ed. 4. 35. 11
H. 4. 55. 10 H.
6. 26.

And if the tenant hold by the services by which the F
mesne holdeth over, and also by other services, it is a good owelty to have acquittal, because it is such, and more. And although the lord die depending the writ of *mesne*, yet the writ shall not abate (d).

25 H. 6. Mesne
12. 17 Ed. 3. 19.
Br. Mesne 22.

(e) And tenant for term of life where the remainder is G
over in fee, shall have a writ of *mesne* against the *mesne*: but tenant for life shall not have a writ of *mesne* against him in the reversion. But tenant in dower shall have a writ of *mesne* against him in the reversion, because she hath her estate by the law.

17 Ed. 3. 15.
contr. per
Thorp.

(a) And if the *mesne* have paid the services unto the H
lord paramount, yet if the tenant be afterwards distrained for

(c) And therefore it seems, if the *mesne* pleads not distrained, the plaintiff shall recover the acquittal notwithstanding, yet it seems he shall not be amerced, if he comes (not) at the day. 30 Ed. 3. 22. 6 Ed. 4. 7. See 30 Ed. 3. 29, 30. 31 Ed. 3. *Judgment* 137. 14 Ed. 3. *Ibid* 158.

(d) And it was accordingly so adjudged in both points. 4 H. 6. 27. *Quære*, if there may be a good fore-

judger in such case, 10 H. 6. 26. and it seemed to *Strange* that there should, for the judgment is no other, but that the *mesne* shall be forejudged, and that the tenant shall be attendant *capitali domino*.

(e) See accordingly, but then he ought to count according to his case, See 13 Ed. 4. *Mesne* 12.

(a) *Note*: Though the services of the *mesne* be not in arrear, yet a writ of

for those services, he shall have a writ of *mesne*. But it is a question whether he shall recover damages in that writ. But it seemeth he shall have damages, because the *mesne* shall recover damages against the lord, if he will put his cattle in the pound for the tenant, and sue a *replevin*, &c. and yet not distrained in his default is a good plea in a writ of *mesne*. And if he pay the services, he is not distrained in his default: for if the *mesne* grant unto the tenant to acquit him after the tenure made, he shall have a writ of *mesne* thereupon, as I conceive (b).

38 H. 6. 12. Pri-
fot. 50 Ed. 3. 23.
10 H. 6. 26. 34
H. 6. 47. 13 Ed.
4. 6. 7 H. 4. 18
18 Ed. 3. 19. 4
Ed. 3. 35. Bill-
ing acc. 14 Ed.
3. Mesne, 12 Ed.
3. Mesne 12. 10
Ed. 3. 58. Ibid.
21. 8 Ed. 3. 26.
Mesne 19.

I And the husband and wife shall have a writ of *mesne* where they are distrained for the lands of the wife.

K (c) If the *mesne* grant the mesnalty for life, and the tenant attorn, the tenant shall not have a writ of *mesne* against the grantee for life. But tenant in tail shall have a writ

of *mesne* lies, because the tenant cannot plead *Rien arrear*. 39 Ed. 3. 34. *contra*. 17 Ed. 3. 15. See 39 Ed. 3. 19. 11 H. 4. 52.

(b) Note; A. is lord, B. *mesne*, C. *mesne*, and D. tenant, A. distrains B. for services, D. brings a writ of *mesne* against C. and recovers, C. brings a writ of *mesne* against B. and counts generally, B. pleads not distrained in his default, and the other replies *contra*, and the special matter is found *ut supra*, and that the services of B. were in arrear, but not the services of C. and it was held, 1. That without some such special mischief the tenant in service, *viz.* the *mesne* shall not have a writ of *mesne*. 2. That in the case of such mischief he shall have it, and so each *mesne* shall have it against the other, till it come to him in whom the default is. 39 Ed. 3. 3. 34. 39 H. 6. 31. 7 H. 4. 18. accordant. 3. That there ought to be a special count, 20 Ed. 3. *Mesne* 14. or at least a special replication, and that on the general issue found, this matter shall not aid him. 4. It seems

that the one *mesne* shall not recover damages of the other before execution, *ibid.* and 17 Ed. 3. 44. 18 Ed. 3. 19. Yet it seems, that notwithstanding the recovery against C. yet if B. had no notice of the distress, or if his services were not arrear, a writ of *mesne* does not lie against him by C. no more than it lies against C. without notice where his services were not in arrear. For in that case there is no default in him. See 7 H. 4. 18. Also, if the *mesne*'s beasts are impounded for those of the tenant, he shall have a *replevin* of them, and so may each *mesne* have, &c. And if any *mesne* refuse to do so, *per Cur'*, the tenant shall have a writ of *mesne*. See 10 H. 6. 26. if the avowry be abateable, or if no services be due or arrear; yet if the *mesne* will not join with the tenant on request, a writ of *mesne* lies, for that the tenant being a stranger, shall not plead in abatement of the avowry.

(c) See 40 Ed. 3. 7. 12 Ed. 3. *Mesne* 11. *contra*.

of *mesne*: and ancient demesne is a good plea in a writ of *mesne* (d).

46 Ed. 3. 7. 28
Ed. 3. 95. 39 H.
6. 3. 28 H. 6. 6.

And a writ of *mesne* lieth against tenant for life where the remainder is over in fee: and the writ of *mesne* shall be maintainable against the heir of the mesne where his ancestors have granted the services of the tenant by fine, if the tenant hath not attorned according to the fine: for he shall not be compelled to attorn without granting acquittal unto him: and if he grant acquittal, he shall have writ of *mesne* upon the grant; and yet it commenceth after the tenour.

39 H. 6. 29. 38
Ed. 3. 34. 4 Ed.
2. Mesne 52. 14
Ed. 2. Mesne 72.
contra, and note
84. contr. 40 Ed.
3. 7. 12 Ed. 3.
Mesne 11.
Mesne 52.

And if the tenant be distrained for the relief of the mesne, or for reasonable aid, &c. he shall have a writ of *mesne* against him.

If a man be tenant by the curtesy of a mesnalty, &c. if the tenant be distrained, the writ of *mesne* shall be sued against him in the reversion, and not against the tenant by the curtesy. H. 4 Ed. 2.

A feignory is granted unto the husband and wife, and to the heirs of the husband, and in a *per quæ servitia* sued by them the tenant will not attorn, unless they will grant to acquit him, &c. for which the husband grants for him and his heirs, to acquit the tenant and his heirs, and afterwards the husband dieth; the tenant may bring a writ of *mesne* against the husband's heir, during the life of the wife who was tenant for life. *Quod nota* H. 5 Ed. 3.

(d) So it is in account against a guardian in socage, and in replevin, 21 Ed. 3. 10, yet see in a writ of mesne on a deed of acquittal by the tenant, the defendant alledges that the lands are held of the manor of S. which is ancient demesne; and it was not allowed, but he was put to answer to the deed. 34 Ed. 1. *Ancient Demesne* 38. But see in a writ of mesne by tenant in dower against the heir who alledges that the tenements are held of the manor of C. which is ancient de-

mesne; and although it was said, that one cannot have process of forejudging on proclamations in a court of ancient demesne, and that the heir cannot be distrained there, for he has only the services, &c. yet it was awarded, that he should take nothing, and it was said, that this plea shall be pleaded in a *petit* writ of right in the lord's court, and that he shall make protestation, &c. 28 Ed. 3. 45. accordant. 30 Ed. 3. 12. *per Skipw.*

And

- P And in the time of *Ed. 1.* the tenant brought a writ of *mesne*, because he did not acquit him of a rent-charge demanded, &c. because he by his deed bound him and his heirs to warrant and acquit him, and it was maintained. Mesne 56.
- Q And an abbot sued a writ of *mesne*, by reason of the confirmation made unto him in *frankalmoigne*, and it was maintainable. *H. 5 Ed. 2.* 5 Ed. 2. Mesne 64.
- R If a man have judgment to recover his acquittal in a writ of *mesne*, if he be not afterwards acquitted, he shall have upon the recovery a *distringas ad acquietandum* against the mesne, if it be three or ten years after the judgment given; and that is given by the statute of *Westm. 2. c. 9.* And a scire facias against the lord. 14 Ed. 3. Mesne 7.
- S If the *mesne* acknowledge acquittal by fine, and after sue a *scire facias* thereupon, and appear not at the return of the writ, then shall issue a writ of *distringas ad acquietandum*, &c. and an *alias* and *pluries*, &c. until he appear; and if he come upon the *distringas*, and cannot plead any thing, but that he ought to acquit him, then the plaintiff shall recover damage against him.
- T (a) And if the ancestor acknowledge an acquittal in a court of record, the tenant shall have a *scire facias*, against the heir to acquit him, without other specialty, &c. (b). 46 Ed. 2. 31. 14 Ed. 3. Mesne 7. 49 Ed. 3. 31. 46 Ed. 3. 31.
- And if a man recover acquittal of a writ of *mesne*, &c. he shall after have a *distringas ad acquietandum*; and if he do not appear, he shall be forejudged by default of his mesnalty; and so if he appear, and it be found by verdict against him, he shall be forejudged (a). [137]
- A And a man shall have a writ of *mesne* to acquit him of suit unto a hundred, which the *mesne* ought to do by reason of his mesnalty, and not by reason of reſiancy, &c. And the process in a writ of *mesne* is summons, attachment and *distringas*; Old N. B. 83. 11 Ed. 3. Br. Suit 4. 1 Ed. 3. 42. 83.

(a) But notwithstanding such acknowledgement of the acquittal, in a writ of *mesne* against the heir, he may plead, that he had nothing in the feignory without shewing how, as that it was demised, &c. *contra* of his father who acknowledged, &c. 28 Ed. 3. 93.

(b) So it is on a recovery. 14 Ed. 3. Mesne 7.

(a) If the lord distrains the mesne for more services than the mesne ought to pay, the mesne is not bound to acquit the tenant of the surplusage. 39 H. 6. 31.

distringas; and if the defendant hath not any thing in the county by which he can be distrained, then the plaintiff may surmise that he hath assets in another county, and pray a *distringas* thither, and he shall have it by the statute; and upon that he shall be forejudged, &c. if he do not appear, and the writ be served and returned against him. But that is given by the statute: for at the common law he shall not have but distress infinite in the same county where the writ was brought, and that is in the county where the land is; and at this day he may chuse whether he will sue the process at the common law, distress infinite in the county, or the process which is given by the statute, summons, attachment and the grand distress, that he shall have day to answer by such times as two counties may be holden, in which the sheriff shall make proclamation that he come to answer the plaintiff; and if he do not come and the writ be returned, then he shall be forejudged.

See 14 Ed. 3. Mesne 7. A. brings a writ of mesne against B. and counts of an acquittance by reason of tenure in frankalmoign, and judgment was, that he should recover damages, and a precept went to the sheriff, *quod distringeret* B. *ad acquietand.* B. dies, a *scire facias* goes against C. the heir of B. to have acquittal, C. not acknowledging that he had the feigniorie at the time, or that he had any more, &c. pleads, that he has nothing by descent in fee from his father within the same lands, &c. And Note; the abbot in the said recovery counted of frankalmoign, *unde chartam*, &c. and therein these points were agreed, viz. 1. That this judgment is well enough to warrant a *scire facias* for the acquittal. 2. That no other process of execution lies

against the heir than a *scire facias*, &c. 3. That the plaintiff need not shew the charter whereby he deraigned the acquittal on the recovery. 4. When an acquittal is granted for one who is not mesne, it is no cause to have a writ of mesne, but only of covenant. 5. On an acquittal which binds the ancestor by reason of a tenure in frankalmoign, frank-marriage, or a deed whereby the acquittal is granted, if the heir has the mesnalty, he shall be bound to the acquittal by writ of mesne, although he has nothing by descent in fee-simple, from him by whom the acquittal commences. But there it seems he may disclaim in the mesnalty; *Quære*, wherefore the abbot had judgment, &c. and affirmed in a writ of error. 15 Aff. 9.

Writ de Plegiis acquietandis.

C **T**H E writ *de plegiis acquietandis* lieth, where a man becomes pledge or surety (a) for another to pay a certain sum of money at a certain day, &c. if the party do not pay it at the day, &c. then if he who becomes surety be compelled to pay the money, he shall have this writ against him who ought to have paid the same. But it hath been a question whether this writ lieth without shewing a specialty; and it seemeth reasonable that it be maintainable, although he have not any specialty to prove it. For the writ, as it seemeth is given by the statute of *Magna Charta*, cap. 8. which is, *quod si plegii voluerint, habeant terras & tenementa debitoris quousque sit his satisfacti de debito quod antea pro eo solverint.* And there is not a word of any writing made betwixt them; and if he have a writing, then he may have his remedy thereupon by the common law, or by writ of covenant, or debt; and then that statute needed not to have been made. And *Pasch.* 43 *Ed.* 3. 10. it is adjudged, that the writ *de plegiis acquietandis* lieth without any specialty shewed thereof, and it seemeth good reason, because the statute makes the lien in that case, and that appeareth by the Register, for writs are given for the executors of him who became pledge, and against him who was the debtor, because their testator did not acquit his sureties, &c. And this writ is *vicontiel*, and may be sued in the county before the sheriff, or in the common pleas by a *præcipe*; and the form of the writ is as follows;

The king to the sheriff, &c. We command you, that you justice A. that justly, &c. he acquit B. of twenty shillings, whereof he hath put himself in pledge against C. and hath not yet acquitted him, as it is said, as he shall reasonably shew that he ought

2 Inst. 20. See
122. K. 43 Ed.
3. 11.

Vide 22 Eliz.
Dyer 378. 2 Inst.
20. contr.

Fitz. Pledges 9.
there it was al-
leged, that the
custom of Lon-
don was such. 43
Ed. 3. 11.

(a) So if A. and B. are bound to C. *conjunctim & divisim* i.e. the debt of A. yet seeing B. is not named pledge, or *fidei jussor* in the obligation, this writ does not lie for B. for both

are principals. *Pas.* 22. *Rot.* 1. See *Dyer* 257. and 370. accordant; yet a jury may find *quod posuit se in pleg'* for the defendant against the debtee.

to acquit him thereof, that we may hear no more clamour thereupon for want of justice, &c. And the form of the writ for the common pleas is such. *The king, &c. Command A. that justly, &c. he acquit B. of one hundred marks, whereof he hath put himself in pledge against C. and hath not yet acquitted him, as it is said, &c. and unless, &c. Or thus for executors: command A. and B. executors of the testament, &c. that justly, &c. they acquit E. of &c. whereof he the said E. hath put himself in pledge against D. and hath not yet acquitted him, &c.*

And if a man become surety for another in the exchequer to account for him, and do not, he shall have a writ against him to discharge him of the account; and the writ is,

The king, &c. Of acquitting A. of a certain account, which the aforesaid B. for himself undertook to render before our treasurer and barons of the exchequer for the time in which he the said A. was bailiff of the liberty of Isabel queen of England, our mother, in the county of D. and whereof he hath put himself in pledge against us in the exchequer aforesaid, and hath not yet acquitted him, &c.

V. 39 Ed. 3. 9.
by Knivet Br.
Pledges 22. the
plaintiff ought to
have the writ
first against the
party; and if he
be insufficient,
then against the
Pledges. Mag.
Charta, cap. 8.

(a) And if a man becomes surety for another to pay a certain sum of money, or to do other thing, &c. so long as the principal debtor hath any thing and is sufficient, his sureties shall not be distrained, by the statute of *Magna Charta*: and if they be distrained by the sheriff, &c. they shall have a special writ upon the statute to discharge them; and the writ shall be such as follows:

The king to the sheriff, &c. A. and B. have shewed unto us that whereas they became pledges for C. against D. for a certain sum of money in which he the said C. was bound to the aforesaid D. and the said C. hath sufficient whereof he can pay the debt aforesaid; nevertheless you have distrained them the said A. and B. to pay the said debt to the aforesaid D. and because it is unjust that any pledges be compelled to the payment of a debt, so long as the principal debtors have sufficient whereof they can render their debt; we command you, that you distrain C. to pay

(a) See *Mag. Chart. c. 8.* 11 Ed. binds himself in covenant. 48 Ed. 1. 2. *Debt. 172.* 39 Ed. 3. 9. yet he 51. *contr.* and yet he is principal, by *Perk. 33.*

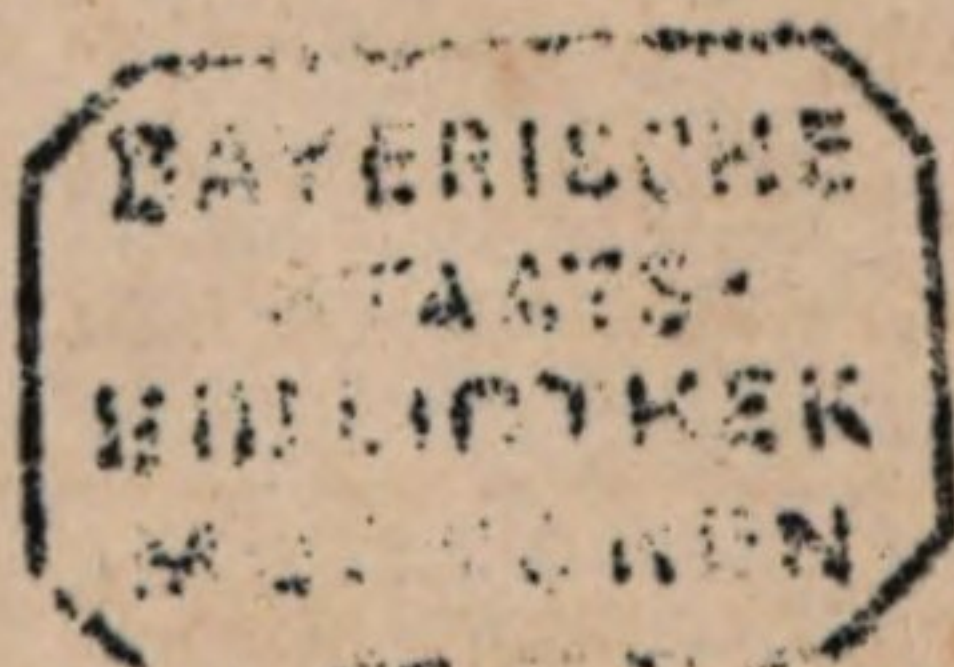
the said money, and that you thereupon permit his pledges to have peace, and that you cause their beasts to be delivered without delay, if you have taken any upon that occasion. Witness, &c.

And it seemeth that this writ lieth where a man recovereth against the sureties in the county, and the sheriff distrains them to pay the debt, where the principal is sufficient: but if he sue the sureties in the common pleas, where the principal is sufficient to pay the debt, &c. now whether the sureties may plead that, and aver that the principal debtor is sufficient to pay it; or whether they shall have a writ to the sheriff not to distrain them, if the principal be sufficient, *quare* of these cases. And the process in the writ is summons, attachment and distress, &c. (b).

39 Ed. 3. 9.
40 Ed. 3. 5.

(b) And Note a judgment in this writ *quod acquietur*, and damages assessed by the court on confession. *Dyer* 257.

END OF THE FIRST VOLUME.



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